

***United States Court of Appeals
for the Second Circuit***



APPENDIX

Docket No. 76-1242

**IN THE
United States Court of Appeals
For the Second Circuit**

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

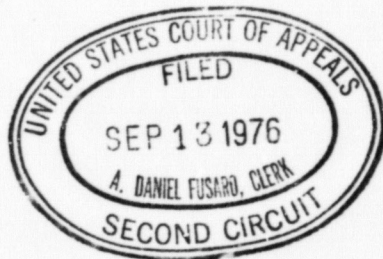
— vs —

WAYNE F. HENRY,

Defendant-Appellant.

On appeal from the United States District Court,
Western District of New York

JOINT APPENDIX



RICHARD J. ARCARA
United States Attorney
Western District of New York

EUGENE WELCH
Assistant United States Attorney
233 United States Courthouse
Rochester, New York 14614
(716) 473-6760
Attorneys for Plaintiff-Appellee

JOHN MANNING REGAN
711 Wilder Building
Rochester, New York 14614
(716) 546-7110
Attorney for Defendant-Appellant

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P/S*

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PROCEEDINGS, dated 1-19-76 and 1-21-76.

UNITED STATES OF AMERICA
IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,)	
)	
- vs -)	CR. NO. 74-194
)	
WAYNE F. HENRY,)	
)	
Defendant.)	
-----)	

Transcript of proceedings had and testimony taken in the above-entitled matter, before the HON. HAROLD P. BURKE, United States District Judge, in the United States District Court, at Rochester, New York, on Monday, January 19, 1976; and Wednesday, January 21, 1976.

APPEARANCES:

RICHARD J. ARCARA, ESQ.
United States Attorney
(By Eugene Welch, Esq.)
Assistant United States Attorney
United States Court House
Rochester, New York 14614

Appearing on behalf of the Government.

JOHN M. REGAN, ESQ.
711 Wilder Building
Rochester, New York 14614

Appearing on behalf of the Defendant.

Waiver of Jury Trial.

Rochester, New York

Monday, January 19, 1976

10:30 A.M.

THE CLERK: United States versus
Wayne F. Henry.

MR. WELCH: The Government is
ready.

MR. REGAN: Ready to proceed,
Your Honor.

MR. WELCH: If Your Honor please,
I have spoken to Mr. Regan, and on behalf
of Mr. Henry, they have waived a jury trial,
and I have here a written waiver signed by
both Mr. Henry, Mr. Regan and myself, and I
tender it to the Court for your approval.

THE COURT: I am speaking now to
the defendant himself.

Do you understand that you are
entitled to a jury trial?

DEFENDANT HENRY: Yes, sir.

THE COURT: And by this written
waiver, you ask this Court to try the case

Opening Statement by Mr. Welch.

without a jury?

DEFENDANT HENRY: Yes, sir.

THE COURT: All right. I approve the waiver.

MR. WELCH: Thank you, Your Honor.

If Your Honor please, this is the case of the United States versus Wayne Henry. I would respectfully request that the Court rule excluding the witnesses from the presence in this courtroom.

THE COURT: The prospective witnesses will go outside the courtroom, please.

MR. WELCH: I have at counsel's table my first witness, Mr. Martin.

If I may, I would like to make a short opening statement, Your Honor, explaining the nature of this case.

THE COURT: Go ahead.

MR. WELCH: The Indictment 74-194 charged three defendants, Duane Baldwin, Wayne F. Henry and Jonathan Klinkert in three Counts.

Count 1, Your Honor, was a con-

Opening Statement by Mr. Welch.

spiracy to dispense a controlled substance.

Count 2, Your Honor, is the actual charge of distribution of a controlled substance called methaqualone by these three defendants.

Count 3, Your Honor, is a charge of possession with intent to distribute a controlled substance known as methaqualone.

The Government will call this morning Investigator Ronald Martin, who was operating in an undercover capacity on May 30th, 1974, and made a purchase from these defendants.

Two of the defendants have entered guilty pleas, and the Government intends to call those witnesses to testify also.

The remaining defendant is Mr. Wayne Henry, Your Honor, and that is on trial this morning.

Through the testimony of Investigator Martin, one or two surveilling agents, and the testimony of the co-conspirators, we intend to prove that Mr. Henry not only

Ronald G. Martin for Government, Direct.

joined in the theft of this material from Pennwalt Pharmaceutical Corporation but also knew that it was a controlled substance and stole it on May 30th with the intent to distribute it, and then participated with the other defendants in the distribution to Agent Martin.

Thank you, Your Honor, that is all I have to say until I call my first witness.

MR. REGAN: I reserve the right to make a statement at a later time, Your Honor.

THE COURT: All right.

MR. WELCH: The United States calls Investigator Ronald G. Martin.

R O N A L D G . M A R T I N ,

called as a witness by the Government, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. WELCH:

Q Mr. Martin, how are you employed?

A I am employed as an Investigator with the New York State Police, currently attached to Troop "E" in Horseheads,

Ronald G. Martin for Government, Direct.

New York.

Q In May of 1974, how were you employed?

A I was assigned to the Drug Enforcement Administration Task Force in Rochester, New York.

Q At that time were you a Federal or State employee?

A I was a State employee, but I was working for the Federal Government at that time.

Q The DEA Task Force is a Federal organization?

A Yes, sir.

Q On May 30th, 1974, would you briefly describe to the Court the nature of your duties while assigned to the DEA Task Force?

A I was Group Supervisor assigned to the DEA Task Force in Rochester, New York. On May 30th, 1974, I was working in an undercover capacity.

Q Directing your attention to May 30th, 1974, at approximately 8:20 P.M., did you have occasion to meet with one Dwane Baldwin?

A Yes, sir.

Q Where did you meet with Baldwin?

A I met him at 121 Avenue E in Rochester, New York.

Q And what, if anything, took place when you met with Baldwin?

A I met with Mr. Baldwin and observed him carrying a brown paper bag to the Government vehicle I was operating.

Ronald G. Martin for Government, Direct.

I asked Mr. Baldwin what was in the bag, and he exhibited a scale. I then went to the trunk of the government vehicle that I was operating and exhibited a "flash roll" of \$5,500 to Mr. Baldwin.

Q When you say a "flash roll," what does that mean?

A A "flash roll" is United States currency to be used to purchase a quantity of narcotics; however, it is not anticipated that the money will change hands.

Q And at that time you showed Mr. Baldwin \$5,500 in cash?

A Yes, sir.

MR. WELCH: Would you mark this
for identification?

(Government's Exhibit 1 marked for
identification.)

Q Investigator Martin, I'm going to show you G-1 for identification and ask you if you have seen that before today?

A Yes, sir, I have.

Q Where did you see that before today?

A This is the scale that Mr. Baldwin put in the vehicle that I was operating.

THE COURT: Will you fix the location?

A At 121 Avenue E.

Ronald G. Martin for Government, Direct.

THE COURT: 121 Avenue E?

A Yes, sir.

THE COURT: Did you meet him by
pre-arrangement?

A Yes, sir. I was with a confidential source at the time,
who introduced me to Mr. Baldwin.

Q At that time when you saw the scale and you were at 121
Avenue E, did you have occasion to have any discussion
with Mr. Baldwin?

A Yes. Mr. Baldwin --

MR. REGAN: Objection, Your Honor.

MR. WELCH: If Your Honor please,
I offer this in evidence as utterances by
a co-conspirator in furtherance of the con-
spiracy.

MR. REGAN: There has been no
foundation as yet.

MR. WELCH: I offer if subject to
connection, which we will make further on
in Mr. Martin's testimony. There is no jury
here, and I am sure Your Honor can strike
it --

THE COURT: All right. I will

Ronald G. Martin for Government, Direct.

receive it, and if it isn't connected, I
will strike it out.

DIRECT EXAMINATION CONTINUED

BY MR. WELCH:

Q Investigator Martin, I ask you if you had any conversation
with Mr. Baldwin while you were at 121 Avenue E?

A The conversation that I had with Mr. Baldwin at 121
Avenue E was regarding the scale and the flash roll that
I already stated.

Q Was there any discussion as to what you were going to be
doing that day?

A Yes. Mr. Baldwin got in the vehicle and he directed me
to Irondequoit -- I believe it was the Town of Irondequoit,
on Sunset Bay. And during the time Mr. Baldwin was in the
back seat of the vehicle, the confidential informant was
in the front seat. I told Mr. Baldwin that I had pur-
chased a quantity of speed from the confidential source
prior to that, and that I was pleased with the quality of
the drugs and that I wished to purchase twenty-five
pounds of speed, as we referred to it, for \$5,500.

Q Did Mr. Baldwin say anything to you?

A Mr. Baldwin said that he would take me to the location
where the speed was, where two other fellows that he was

Ronald G. Martin for Government, Direct.

involved with were located.

MR. REGAN: I object to that.

That is the heart of the charge.

THE COURT: Objection is overruled.

Q What, then, did take place, if anything?

A Mr. Baldwin, myself and the confidential source proceeded in the government vehicle to Sunset Trail. Prior to our arrival at Sunset Trail, there was some kind of a car fire, and there were a number of fire emergency vehicles at the scene. The access to Sunset Trail was blocked off, and it was necessary for me to park the government vehicle in a gas station parking lot. While we were parked at the gas station parking lot, I had a further conversation with Mr. Baldwin, at which time I indicated a concern for the fact that we were going to a desolate area of the county, that I had \$5,500 cash in the trunk of my vehicle and that I knew nothing about the two subjects that I was supposed to meet.

Mr. Baldwin replied to me that one of the subjects was approximately twenty-seven years old and the other was in his mid-thirties, that he had known them and had had transactions with them before, that they were --

MR. REGAN: Objection. Irrelevant.

Ronald G. Martin for Government, Direct.

THE COURT: Objection is overruled.

A -- that they were gentlemen and that I would not have to fear for my safety or for the money.

At approximately nine P.M. the access to Sunset Trail was opened, and I drove down Sunset Trail with Mr. Baldwin and the confidential source.

As I proceeded down the access driveway to 1020 Sunset Trail, I cut off to the left and down a rather steep hill. I was directed to drive, and drove down a steep hill and parked the government vehicle opposite a white garage.

The government money remained in the trunk of the vehicle. I exited the vehicle with Mr. Baldwin and my confidential source and entered a white garage.

Q To your knowledge, is this Mr. Baldwin's house or a garage or someone else's?

A I subsequently learned that the garage was owned by a Jonathan Klinkert.

Q I believe you started to say that you got out of the car?

A Yes, sir. I exited the vehicle and entered the garage. Upon entering the garage, I was introduced to two white males identified as "John" and "Wayne." The white male --

Q Who introduced you to John and Wayne?

Ronald G. Martin for Government, Direct.

A Mr. Baldwin.

Q All right. Continue.

A The white male identified as "Wayne" and later identified as "Wayne Henry" is the white male seated at the defendant table wearing a white turtleneck, brown slacks and plaid jacket.

MR. WELCH: May the record indicate that he has pointed out the defendant, Wayne Henry.

THE WITNESS: The other male was later identified as Jonathan Finkert.

I had a brief conversation with Mr. Henry, at which time he produced a gray plastic bag.

Mr. Baldwin, who had brought the scale into the garage with him at that time, took some smaller bags out of the larger plastic bag and attempted to weigh the contents of the bags. The scale was faulty, and it could not weigh, at which time Mr. Henry said to me that the contents of the bag was twenty pounds, that he had just finished weighing it.

Ronald G. Martin for Government, Direct.

Q This is the defendant on trial here today?

A Yes, sir.

Q Continue.

A I indicated to Mr. Henry that the agreement was twenty-five pounds for \$5,500, and he replied to me that all they had was twenty pounds. At that time I indicated to Mr. Henry that I was prepared to pay \$4,000 for the twenty pounds of speed.

Mr. Henry stated that he had an awful lot of trouble coming by the twenty pounds and that he would have to have more than \$4,000.

Mr. Henry and I argued briefly about the price, whereupon it was agreed that I would pay Mr. Henry \$4,500 for the twenty pounds of speed.

I also said to Mr. Henry that I was going to weigh the contents of the package myself upon return to my house, and that if it did not turn out to be twenty pounds, I would come back to see him.

Mr. Henry replied that he was sure that it was twenty pounds and that I would be happy with the package.

MR. WELCH: I would like to have this marked for identification, but it contains loose substance, and I would like to

Ronald G. Martin for Government, Direct.

keep it within the plastic bag so as not to spread the substance around.

Would you mark these for identification?

(Government's Exhibits 2 through 7 marked for identification.)

THE COURT: What is G-2?

MR. WELCH: G-2, Your Honor, is a plastic bag containing another plastic bag, containing a brown substance.

THE COURT: G-2 through 7 are all plastic bags containing a brown substance?

MR. WELCH: Yes, Your Honor.

THE COURT: All right.

MR. WELCH: Would you mark this for identification?

(Government's Exhibit 8 marked for identification.)

MR. WELCH: Would you mark this for identification?

(Government's Exhibit 9 marked for identification.)

MR. WELCH: G-9, Your Honor, is

Ronald G. Martin for Government, Direct.

also a plastic bag containing a brownish substance.

Q Investigator Martin, I'm directing your attention to G-2 through 7 and G-9 and ask you if you have seen those Exhibits before?

A Yes, sir.

Q Where have you seen those before?

A These are the items that I purchased from Mr. Henry on May 30, '74, about 9:10 P.M.

THE COURT: Were they all in that condition, in bags enclosed in the big bag?

A Yes, sir.

MR. REGAN: Your Honor, I ask that you strike the phrase "purchased from Mr. Henry." It was a conclusion.

THE COURT: I will sustain the objection. There hasn't been any evidence about that yet.

THE WITNESS: These were items that I received from Mr. Henry at 9:10 P.M. on May 30th, 1974.

Q I will direct your attention to the gray plastic bag that is within the brown box and yellow plastic bag. Have you

Ronald G. Martin for Government, Direct.

seen that plastic bag before?

A Yes, sir.

THE COURT: What is the number of that?

MR. WELCH: G-8, Your Honor.

THE WITNESS: This is the bag that I --

THE COURT: Just a moment. That is confusing. You had a gray bag?

MR. WELCH: Yes.

THE COURT: Now you've got the same Exhibit. You call it the same Exhibit, but in addition to that, it is a carton with a yellow bag.

MR. WELCH: We are offering in evidence just a gray bag, but I ask that it be kept in here because it had some substance loose in the bag.

THE COURT: Mark as one Exhibit. I see one Exhibit, and I see three items, a carton, a yellow bag and a gray bag.

Q G-8 is a brown carton with a yellow plastic bag in which is found a gray plastic bag. Now directing your atten-

Ronald G. Martin for Government, Direct.

tion to the gray plastic bag, have you seen that bag before?

A Yes, sir. That is the plastic bag I received from Mr. Henry at 1020 Sunset Trail on May 30th, '74.

Q What, if anything, was inside that gray plastic bag when you first saw it?

A Seven other smaller plastic bags, each containing a brown substance.

Q And are those the plastic bags marked G-2 through G-7 and G-9?

A Yes, sir.

MR. REGAN: I haven't seen them before.

MR. WELCH: I have seen them for the first time this morning. They have been in safe-keeping until this morning.

Q You say you received these from Mr. Henry with the other defendants present when Mr. Henry gave these to you?

A Yes, sir.

Q What, then, took place, if anything, after you received these plastic bags from Mr. Henry?

A I took the gray plastic bag containing the smaller plastic bags to the trunk of the government vehicle I was operat-

Ronald G. Martin for Government, Direct.

ing. I opened the trunk of the vehicle and placed the gray plastic bag containing the smaller bags inside the vehicle. At that time I withdrew a brown paper bag containing the \$5,500 flash roll and proceeded to count out the money that Mr. Henry and I had agreed on.

Q When you say "count it out," could you explain to the Court exactly how you did that?

A I took the roll of money out, which consisted of hundred dollar bills, and began to count from one hand to the other. I believe I got up to something like \$300 when the surveilling officers arrived at the scene and effected an arrest of Mr. Henry and the other subjects who were inside the garage at the time.

Q When you were counting this money yourself, hand to hand, was anyone else nearby you at that time?

A Mr. Henry was standing right next to me, observing me count the money.

Q Let me clarify this for the Court.

You received the bags inside the garage?

A Yes, sir.

Q And took the bag out to the government vehicle?

A Yes, sir.

MR. REGAN: Don't lead the witness

Ronald G. Martin for Government, Direct.

anymore now, please. I object, because he is trying to lead him into saying --

THE COURT: I will sustain the objection.

Q Who, if anyone, accompanied you to the government vehicle?

A Mr. Henry.

Q Did anyone else accompany you to the government vehicle?

A No, sir.

MR. WELCH: If Your Honor please, I offer into evidence G-1 through 9.

MR. REGAN: Subject to connection. There is no proof, Your Honor, that these are a controlled substance at this point, so consequently, they are irrelevant.

THE COURT: I assume you will?

MR. WELCH: We have the chemist on his way, and I think he may be here right now.

THE COURT: All right. I will receive them on the condition that that testimony is available.

(Plaintiff's Exhibits 1 through 9 marked in evidence.)

Ronald G. Martin for Government, Direct.

Q Directing your attention to Exhibits G-2 through G-9, the plastic bag Exhibits, after the arrests were made, what did you do with those Exhibits?

A Those Exhibits were secured in the trunk of the government vehicle I was operating, at which time they were taken to the Monroe County Sheriff's Office where the DEA was operating --

THE COURT: Did you take them there?

A Yes, sir. They were in the trunk, yes, sir, and at which time they were removed from the trunk of the vehicle.

THE COURT: You removed them?

A Yes, sir, and taken up to the Monroe County Sheriff's Office, which is where we were operating out of at that time. At that time I weighed the Exhibits and sealed them. The Exhibits were then placed in the Monroe County Sheriff's Office evidence vault by myself and Deputy Berrardi.

Q What then happened with the Exhibits G-2 through G-9, if anything?

A That is the last connection I had with the Exhibits G-2 through 9.

Q On May 30th, 1974, were you wearing any transmitting

Ronald G. Martin for Government, Direct.

equipment?

A Yes, sir. I was wearing what is known as a Kel transmitting device. It is a small body transmitter about the same size as a pack of cigarettes, only somewhat thinner.

Q Does that transmit a beeping device?

A No. It transmits conversation conducted by myself and other people in my proximity. The device was being monitored by Rochester Police Detective Donald Migliorati.

Shortly after installing the device on my person, I had occasion to check this device with Detective Migliorati at the Princess Diner in Rochester. The device was functioning properly.

MR. REGAN: That is a conclusion,

Your Honor.

THE COURT: Objection is overruled.

Q Did you have occasion to test the device?

A Yes, sir. I tested the device by dictating to Detective Migliorati, and if he heard the conversation that I was making, to blink his headlights at me. I had visual observation on Detective Migliorati, and he blinked his lights.

MR. WELCH: Would you mark this for identification?

Ronald G. Martin for Government, Direct.

(Government's Exhibit 10 marked
for identification.)

Q Investigator Martin, I'm handing you G-10 marked for identification and ask you if you could describe that to the Court, please?

A Yes, sir. This is a DEA Form 7, commonly referred to by us as a Laboratory Report. In this particular case it is dated May 30, 1974, and contains the alleged drugs phentermine, a brown powder contained in seven plastic bags, no marks or labels. Each of the seven plastic bags further contained in another plastic bag, which is labeled "Polyliner -- Rubbermaid Commercial Products, Inc."

Q If I may interrupt, does that document contain your signature?

A Yes, it does.

Q Is that routinely prepared in the ordinary course of processing seized controlled substances?

A Yes, sir.

Q Did you routinely prepare that document in processing these controlled substances?

A Yes, I did.

MR. REGAN: May I have a preliminary examination on this?

Ronald G. Martin for Government, Voir Dire and Direct.

THE COURT: Yes.

VOIR DIRE EXAMINATION

BY MR. REGAN:

Q What part of this document was filled out when you signed it?

A The part of No. 14 upwards.

Q In other words all after No. 14, that is, Items 15 through 38 were blank?

A That's correct.

DIRECT EXAMINATION CONTINUED

BY MR. WELCH:

Q Investigator Martin, Item No. 7 says, "Alleged Drugs: Phentermine"?

A Yes, sir.

Q In your experience in investigating controlled substance cases, have you ever seen phentermine before May 30th, 1974?

A Yes, sir, I did.

Q Have you ever seen methaqualone before May 30th, 1974?

A Yes, sir.

Q Could you describe the appearance of both of those controlled substances? First of all phentermine.

THE COURT: They are right there,

Ronald G. Martin for Government, Cross.

aren't they?

Q Are you aware of what those controlled substances are in those bags?

A I am now, yes, sir.

Q Is there any difference between the appearance of phentermine and methaqualone to the naked eye?

A No, sir.

MR. WELCH: I have no further questions of this witness, Your Honor.

CROSS EXAMINATION

BY MR. REGAN:

Q What color was the phentermine that you saw?

A It is the same stuff as this, sir. It was a brown B-B, you know, small B-B's.

Q In what shape was it when you saw it?

A It was the same shape was this (indicating). It appeared to be round.

Q How about methaqualone?

A It was the same appearance as this, sir (indicating).

Q What was the color?

A The same color.

Q Dark brown?

A Yes, sir.

Q Agent Martin, when was the first time you met with Mr. Baldwin?

A Approximately 8:20 P.M. on May 30th, 1974.

Ronald G. Martin for Government, Cross

Q You had never seen him before?

A That's correct.

Q And your confidential source, what was his name?

MR. WELCH: I object, Your Honor.

A It is a confidential source.

THE COURT: I will sustain the
objection.

Q Well, male or female?

MR. WELCH: Objection, Your Honor.

THE COURT: Objection is overruled.

THE WITNESS: He was a male.

Q Do you know whether or not he knew Mr. Baldwin?

A I believe he knew Mr. Baldwin.

Q And you had never met Mr. Baldwin at any time prior to
this at any place, correct?

A That's correct.

Q Had you been informed of what Mr. Baldwin looked like
prior to your meeting him?

A Well, a casual-type of information. Yes, sir, I had not
seen a picture of him, if that is what you mean.

Q Had you been told anything about him?

A Just that he had and was dealing with two other males
who had access to large quantities of phentermine.

Ronald G. Martin for Government, Cross.

Q Did you learn this from the source or from some other source?

A From the source, the confidential source.

MR. REGAN: I would like to note my exception to the failure to disclose the name of the confidential source.

Q How come you had \$5,500 with you?

A Because that was the price I understood Mr. Henry, Mr. Baldwin and Mr. Klinkert wanted for the twenty-five pounds of phentermine.

Q You never met Mr. Baldwin prior to 8:20 on the night of the 30th of May?

A That's correct. That information was transmitted to me by a confidential source.

Q So you didn't have any conversation with Baldwin prior to that, did you?

A That's correct.

Q You didn't have any conversation with Klinkert prior to that?

A That's correct.

Q You didn't have any conversation with Henry prior to that?

A That's correct.

Q And you didn't know Henry either?

Ronald G. Martin for Government, Cross.

A That's correct.

Q And you didn't know Klinkert?

A Correct.

Q And you didn't know Baldwin?

A Correct.

Q All you knew is what the source had told you, right?

A That's correct.

Q And you were looking for phentermine, right?

A That's correct. It was referred to as "speed." It was not referred to as "phentermine."

Q This is an "upper," isn't that true?

A That's correct.

Q In street talk?

A Yes, sir.

Q It is not an opiate or a depressant, is that correct?

A That's correct.

Q Were you told by your confidential source to have the money with you at that time?

A No, sir.

Q This was something that you did on your own?

A That's correct.

Q And not having met Mr. Baldwin and not knowing about him, you did not ask for a sample of this material?

Ronald G. Martin for Government, Cross.

A I was aware through the confidential source of the material that we were purchasing.

Q You didn't ask for a sample?

A That's correct.

Q Did the confidential source tell you that he had asked for and secured a sample?

A No, sir. The confidential source had been around prior to this occasion with a quantity of phentermine, and this is where the confidential source stated that he had received the phentermine. So, in effect, he had a sample.

Q Had you seen any of that sample?

A Yes, sir.

Q So it was for that reason, then, that you had a tendency to rely on your source, is that correct?

A Yes, sir.

Q Did the source name "Baldwin"?

A Yes, sir.

Q Did he name "Klinkert"?

A No, sir.

Q And he didn't name "Henry," either, did he?

A That's correct.

Q You testified before the Grand Jury?

A Yes, sir.

Ronald G. Martin for Government, Cross.

- Q You do remember that?
- A I remember testifying, yes.
- Q And you have reviewed your testimony with Mr. Welch prior to coming here today?
- A Yes, sir.
- Q Forgetting all about your difficulties in getting to Sunset Trail and the fire and so forth, when you got there and drove in the driveway, where were Mr. Henry and Mr. Klinkert when you first saw them?
- A They were inside the garage that I described previously.
- Q So the garage door was open?
- A I believe the garage door was closed. It was unlocked, but the garage door was closed.
- Q Well, was it a transparent door?
- A I don't remember.
- Q In fact, you got out of the car and went into the garage before you saw them, is that true?
- A That is what I said, yes, sir.
- Q Was there anybody with you at this time, other than the source, who was a man, you and Mr. Baldwin in that car?
- A There was a surveillance team following me.
- Q But they weren't in the car, were they?
- A That's correct.

Ronald G. Martin for Government, Cross.

Q There were only three of you in the car?

A Yes, sir.

Q Did all three of you go into the garage?

A Yes, sir.

Q In your testimony before the Grand Jury, and I want you to look this over for me at this time, and I guess it starts of Page 10 --

A Do you have a copy I could look at?

MR. REGAN: Would you mark this as Defendant's Exhibit 1 for identification?
(Defendant's Exhibit 1 marked for identification.)

MR. REGAN: I will read through quickly but thoroughly Pages 10 through 14.

THE COURT: He has already read it.

Q Without reading it, will you just answer this question "yes" or "no"?

Can you recall whether you told the Grand Jury, in words or substance, that you had used the words "speed" or "phentermine" to Henry?

"Yes" or "no"?

A I don't recall.

Q You will have to read it. Read Pages 10 through 14.

Ronald G. Martin for Government, Cross.

THE COURT: You have read it.

You can point it out to him.

MR. REGAN: I am trying to establish that he did not use the word. That is much more difficult than trying to establish that he did. So I want him to read his testimony from Page 10 to 14, which covers the implication of Henry and answer the question --

THE COURT: I can read that when I decide the case.

MR. REGAN: Your Honor, it will only take a minute. Let the witness answer the question.

Go ahead.

THE COURT: It will take more than a minute to read four pages.

You can make a statement that he did not use the word, and if I conclude that isn't so, why that is it. I will take it *prima facie* that he did not use that word.

Q You didn't tell the Grand Jury that you at any time mentioned "speed" or "phentermine" to Henry, did you?

Ronald G. Martin for Government Cross.

THE COURT: I shall take it now
as established --

MR. REGAN: All right. Thank you.

Q As a matter of fact, you expected phentermine to be the substance that was being sold, isn't that true?

A That's correct.

Q Did it later become apparent to you the results of the chemical test?

A Yes, sir.

Q And you found out at that time that it was methaqualone, isn't that true?

A That's correct.

Q When you agreed to twenty-five pounds of this substance, did your agreement with Baldwin require that the substance be pure?

A No, sir.

Q What was your agreement with Baldwin in respect to the substance?

A That the substance would be of the same quality that I had purchased on a prior occasion.

Q But you said you never met Baldwin, Mr. Martin, so you didn't --

A I didn't say "purchased from Baldwin."

Ronald G. Martin for Government, Cross.

Q How would he know what you had purchased on a prior occasion?

A He had given phentermine or sold phentermine to the confidential source, who I purported to have purchased from him, from the confidential source.

Q Did you tell Baldwin at the time you met him that you had purchased phentermine from the confidential source and that the confidential source had told you that Baldwin was his supplier?

A Yes, sir. I'm not sure whether it was phentermine or "speed." The terminology that we used was probably "speed."

Q Did Baldwin acknowledge prior dealings with your confidential source to you at that time?

A Yes, sir. I remember, you know, just from the manner in which our conversation was taking place.

Q Now the defendant Henry had no knowledge of your prior conversations with Baldwin at Avenue E, did he?

MR. WELCH: Objection, Your Honor.

THE COURT: Objection is overruled.

A I don't feel I can answer that question in its entirety, although --

Q All right. Henry wasn't there, was he?

Ronald G. Martin for Government, Cross.

- A That's correct. He was not.
- Q You did not tell Henry the words or substance of those conversations, did you?
- A When I 'poke to Mr. Henry, I told him that we had agreed on twenty-five pounds for \$5,500, so in sum and substance I did convey some of my conversation with Mr. Baldwin.
- Q The price for the substance?
- A And the weight, yes.
- Q And the weight?
- A Yes.
- Q But not the substance, not the name?
- A That's correct.
- Q Your testimony at the Grand Jury was that Henry replied that the stuff was hard to come by, right?
- A Yes, sir.
- Q So he didn't use the word "speed," either?
- A Yes, sir, that's correct.
- Q When you weighed this substance, were you in the garage?
- A An attempt was made to weigh the substance, but the scale that Mr. Baldwin provided was not functioning, and yes, we were inside the garage.
- Q Did you use the other scale?
- A I did not see another scale there. Mr. Henry stated that

Ronald G. Martin for Government Cross.

there was twenty pounds there.

Q You say you said Mr. Baldwin was weighing, or attempting to weigh the material on the scale, and Mr. Klinkert and Mr. Henry were present and watching?

A That's correct.

Q Is that what happened?

A Yes, sir.

Q How far was this car from the garage door?

A Probably a car length and a half away, parked at somewhat of an angle. In other words, when I parked the car, I did not want the garage to blind the surveillance team from being able to see the trunk of the vehicle.

Q What time was it when you left the garage and you went to the car?

A Approximately 9:10 or 9:15, I believe.

Q Was it dark?

A It was dusk.

Q And the signal, as you said, was that you would raise the trunk lid, is that true?

A Yes, sir.

Q And you did raise the trunk lid?

A Yes, sir.

Q And that was the signal for your associate officers to

Ronald G. Martin for Government, Cross.

make the arrest?

A That's correct.

Q How much time elapsed between the time you raised the trunk lid and the time that they arrived at the scene?

A Possibly twenty, thirty seconds, just long enough to place the bag and get the money out and start counting it.

Q Are those bags in exactly the same condition they were in when you left them at the office of the Monroe County Sheriff?

A Yes, sir, with the exception of the bottom here, which is where the chemist would break it to conduct his analysis.

Q The answer is "no," they are not in the same condition, right?

A That's correct.

THE COURT: With the qualification that he has described.

MR. REGAN: That means the answer is "no."

THE COURT: It doesn't mean that the answer is "no."

Q How many bags contained this -- and what is it that you called what the chemist does?

A I'm not sure I understand the question.

Ronald G. Martin for Government, Cross.

Q You said there was a slit or tear or something?

A It is on the bottom. Normally, the evidence bag is sealed on the bottom and opened at the top. When we send something down to the lab, we fill out the evidence tag and seal the top. The lab, when they conduct their analysis, slits the bottom so that they are not doing anything to our seal whatsoever and conducts its analysis and reseals it at the bottom.

Q How many of those bags have been slit and resealed by the chemist?

A Six, and this one I can't see the interior. I would have to see the inside on this one (indicating).

THE COURT: I don't know what number this one is.

THE WITNESS: Excuse me -- it is No. 2.

Q Exhibit G-3, Exhibit G-9, Exhibit G-7, Exhibit G-4, seem to be a bag of a certain type all containing a brown substance, is that correct?

A Yes, sir.

Q And that is the way they were when you saw them first?

A Are we talking about including the small plastic Baggie there? Are you including that?

Ronald G. Martin for Government, Cross.

Q Are you telling me that there is a plastic bag inside this plastic bag?

A I believe there is, yes.

THE COURT: What is the number of this plastic bag?

Q You are telling me, Officer Martin, that in respect to Exhibit G-4 there is a plastic bag inside the plastic bag?

A Yes, sir, that is what I am telling you.

Q Which of these plastic bags, or both, if that were the case, was present at the time that you first took possession of that?

A The plastic bag within Exhibit G-4.

Q Who supplied the outer plastic bag?

A The Drug Enforcement Administration.

Q Is that true for Exhibits G-4, G-9, G-3 and G-7?

A That is correct.

THE COURT: What were the reasons for putting them in another bag?

A Because these were in small plastic Baggies, sir, and they are quite fragile.

THE COURT: All right.

Q But in any event, this large transparent heavy-duty plastic bag with all these labels on it wasn't out at

Ronald G. Martin for Government, Cross.

Sunset Trail at Webster, was it?

A That's correct.

Q That is also true, then, I assume, for Exhibits G-6, G-5 and G-2?

A That's correct. These Exhibits are also DEA evidence bags, evidence containers.

Q Let's take a look at Exhibit G-5, and we find that inside G-5 we have got white plastic bags, transparent plastic bags and loose plastic bags, is that true?

A Yes, sir.

Q And inside Exhibit G-2 you have white plastic bags, transparent bags with a brown substance in it, and you have even got a little vial of something or other, isn't that true?

A That's correct. The vial contains the sample that the laboratory man would have taken for analysis. However, he would be --

Q What I want to know is which of the inner bags was present at Sunset Trail?

A All of the inner bags.

Q So the DEA, which is the Drug Enforcement Administration, supplied only the outer bags?

A That's correct.

Ronald G. Martin for Government, Cross.

THE COURT: And the vial?

A Yes, sir.

Q Of the inner bag, I see that Exhibits G-7, G-4, G-9 and G-3 contained no white plastic bag?

A That's correct.

Q So at Sunset Trail that night, there were two types of plastic bags inside the gray bag (indicating)?

A I would say there are three.

Q Three?

A Yes, sir.

Q Three types of bags inside there?

A That's correct. The smaller transparent plastic, the larger transparent plastic and the white plastic.

Q The smaller transparent plastic as appears in G-7?

A That's correct.

Q G-4, G-9 and G-3, correct?

A That's correct.

Q The larger transparent bag as contained in G-6 and G-5 and G-2?

A Yes.

Q And then a translucent or opaque white paper bag?

A It is a white plastic bag, sir.

Q All right -- forgive me -- a white plastic bag?

Ronald G. Martin for Government, Cross.

A As contained in G-5, G-6 and G-2.

Q So there was at least ten bags?

A Yes. There were ten bags, correct.

However, the controlled substances found was divided into seven bags?

Q We will find out about that when we talk to the chemist, but there were ten bags originally?

A That's correct.

Q Necessarily, right?

A Yes.

Q In respect to each of the bags, was the quantity of substance in each of them approximately the same at the time you found them?

A Yes, sir.

Q Then how is it that the quantity of the substance is so much different --

A I misunderstood the question. I thought you were saying: Is the quantity of substance the same in the evidence bag as I received them from Mr. Henry, and that's correct.

If you are asking me if the quantity was equally divided in seven bags, no, it was not.

Q Was the quantity of the substance equally divided among the ten bags? That is what I'm asking.

Ronald G. Martin for Government, Cross.

A It was divided into seven bags.

Q We have established there were ten bags, right?

A That's correct.

Q Now I'm asking you simply after having agreed with you that there were ten bags, was the quantity of substance in each of the ten bags approximately equal?

A No, sir. The substance was located in only seven bags.

Q Are you trying to say that three of the bags were empty?

A Yes. They were either empty or just containing a smaller bag within.

Q You would know an empty bag when you picked it up. Which of the ten bags were empty?

THE COURT: Just a moment. I understand what this is, and I think you are laboring the point.

There were seven packages?

A That's correct.

THE COURT: And in those seven packages, some of them had an outside wrapper.

A That's correct.

THE COURT: An outside bag?

A Right.

Ronald G. Martin for Government, Cross.

Q Are you trying to say that some packages were wrapped with two bags?

A I believe so, yes, sir.

Q Or are you trying to say what you said before, that some of the bags were empty?

THE COURT: You are laboring the point. This is silly to me. I know there were seven packages. Some of them were two bags, an inner bag and an outer bag.

MR. REGAN: I respectfully submit that you were not there, that you do not know --

THE COURT: You don't have to tell me that, and I think that is silly, too.

MR. REGAN: You were not there?

THE COURT: And you weren't, either. Don't waste my time with those elementals.

MR. REGAN: This is an important point for the defendant.

THE COURT: It escapes me at the moment.

Q I want to know if the contents of each of the bags at the

Ronald G. Martin for Government, Cross.

time you picked them up was essentially even or equal?

A No.

Q Were the contents at the time you picked them up essentially the way they are there now?

A Yes, sir.

Q Did you open any of them at the scene?

A Yes, sir; however, there were some loose pellets inside the gray plastic bag, a small amount.

THE COURT: The bag, Exhibit 87

A Yes, sir.

Q Is the answer you did not open any?

A That's correct.

Q Therefore, you did not see what was inside the white opaque bag, did you?

A At the scene?

Q At the scene.

A That's correct.

Q How many of those white bags were the outside bag?

A I don't recall.

Q More than one?

A I don't recall.

Q You testified on direct examination about some device that transmits conversations?

Ronald G. Martin for Government, Cross.

A Yes, sir.

Q Were any conversations transmitted on that device, to your knowledge, by this defendant?

A Yes, sir.

Q Have then been transcribed?

A No, sir.

Q Do you know at what time the transmissions were made?

A The transmissions were made from a period of time from eight o'clock P.M. until probably nine fifteen, nine twenty, on May 30th, 1974.

Q You mean after you arrived at the garage, and the time between that event and the time of the arrest?

A Yes, sir, from the time I met the informant until the time after the arrest was effected.

Q When is the last time you listened to these transmissions?

A I was not listening, sir. I was transmitting.

Q How do you know there are any transmissions unless you have heard a recording?

A The man who was overhearing the transmissions told me, and as I said when I checked the transmitter out to see if it was functioning.

Q A man heard the transmissions, is that correct?

A That's correct.

Ronald G. Martin for Government, Cross.

Q Did he record them?

A I do not believe so.

Q What is his name?

A Detective Migliorati.

Q Have you talked to Detective Migliorati recently about the transmissions?

A Yes, sir.

Q How recently?

A This morning.

Q Is the conversation that you had with Migliorati this morning the basis, at least, for some of the testimony that you have given here today?

A I would say the basis for that would be the conversation that I had with him that night.

Q May 30th, 1974?

A That's correct.

Q That was the subject matter, however, of your conversation this morning, wasn't it?

A Yes, sir.

Q And so far as you know, there has been no recording of that transmission?

THE COURT: No, no transcripts.

A No recording.

Ronald G. Martin for Government, Cross.

Q Any kind, either transcript --

THE COURT: There was a recording when they were speaking. That is a recording.

MR. REGAN: You could put it on tape, Your Honor.

THE COURT: I don't know any other way you can get it.

MR. REGAN: You can write it down with a pencil.

THE WITNESS: The taped portion of the recording device was not functioning at the time that the Kel transmitter was used.

MR. REGAN: Thank you. I have no further questions.

MR. WELCH: I have nothing further.

THE COURT: We will take a short recess.

(Recess from 11:45 A.M. to 12:00 P.M.)

MR. WELCH: The United States calls Detective Donald Migliorati to the

Donald J. Migliorati for Government, Direct.
stand.

D O N A L D J . M I G L I O R A T I ,

called as a witness by the Government, being first duly sworn,
testified as follows:

DIRECT EXAMINATION

BY MR. WELCH:

Q Detective Migliorati, would you tell the Court how you
are employed presently?

A I am presently employed by the City of Rochester Police
Department.

Q In what capacity?

A As an undercover narcotics officer.

Q And in May of 1974 how were you employed?

A The same, sir. I was assigned to the Special Criminal
Investigation Section of the Rochester Police Department
on detached duty to the Rochester Drug Enforcement Admin-
istration Task Force.

Q And on May 30th, 1974, pursuant to your duties with the
DEA Task Force, did you have occasion to participate in
a surveillance that day?

A Yes, sir, I did.

Q Could you tell the Court where the surveillance ended up?

A The surveillance ended up at 1020 Sunset Trail in Webster.

Donald J. Migliorati for Government, Direct.

New York.

Q And could you locate that any further? Is that near any major landmark?

A Yes, it is on Irondequoit Bay, right off of Bay Road, approximately one thousand feet north of Old Bridge Road.

Q Who were you watching that day?

A The surveillance was on Investigator Martin and an informant, along with some other people.

Q Directing your attention to that day, that surveillance, during the course of that surveillance, did you have an occasion to see this defendant, Wayne Henry?

A Yes, I did.

Q Where did you first see Wayne Henry?

A The first time I observed Wayne Henry was approximately nine minutes after ten that evening, May 30th, 1974, as he exited a two-car garage located at that address.

Q What, if anything, did you see him do at that time?

A At that time he was with Investigator Martin. He walked over to the official government vehicle R-17, and that was a 1974 four-door blue Pontiac. Investigator Martin opened the trunk of that vehicle, and Mr. Henry was standing right alongside of Investigator Martin.

Q Do you know Duane Baldwin or Jonathan Klinkert?

Donald J. Migliorati for Government, Direct.

A Yes, I do.

Q When you saw the defendant, Wayne Henry, with Agent Martin were Baldwin and Klinkert there?

A At that time they were still in the two-car garage.

Q Were you in a position to hear any of the conversation between defendant Henry and Agent Martin?

A Yes, sir.

Q And could you describe to the Court how that was that you were able to hear that conversation?

A Yes, sir. Before the surveillance I secreted a miniature transmitter on Investigator Martin's body. I then had a receiver in my vehicle, which was tested.

Q When you say it was tested, how do you mean?

A At a prearranged time, prior to picking up Mr. Baldwin, Investigator Martin drove his vehicle past me and my signal was to blink my lights if I could overhear his conversation in his vehicle.

Q And did you do so?

A Yes, I did.

Q Were you able to overhear his conversation?

A Yes, sir.

Q Then directing your attention back to 1020 Sunset Trail in the evening of May 30th, 1974, would you please relate

Donald J. Migliorati for Government, Direct.

to the Court the substance of the conversation as best as you can recall you heard being transmitted through Agent Martin's transmitter?

A Yes, sir.

MR. REGAN: I object, Your Honor.

There is no foundation that this witness has ever heard Mr. Henry say anything.

MR. WELCH: I submit, Your Honor, that Mr. Martin has established that Mr. Henry was in the garage at the time that the co-conspirators were there. There was a great deal of conversation going on, all of it by either Agent Martin or the co-conspirators in furtherance of the conspiracy, and what any of the co-conspirators said is relevant to this conspiracy and is admissible, and I think with some further questions, I can also pinpoint what was said by Mr. Henry.

THE COURT: Objection is overruled.

I will receive it.

THE WITNESS: Mr. Henry and Agent Martin were discussing the price of the

Donald J. Migliorati for Government, Direct.

suspected drugs, and the weight of the suspected drugs.

Q Is this while they are out-of-doors, or while they are in the garage?

A While they are in the garage.

Q And do you recall what Mr. Henry said?

A Yes, sir.

MR. REGAN: Your Honor, I object.

He can't see inside the garage. He doesn't know who was saying anything, and to admit this evidence on this witness' testimony violates all the rules of hearsay. He doesn't know who was speaking. He can't see inside. He hasn't established any voice recognition at all. Admitting this evidence is a violation of all the rules of evidence.

THE COURT: It is not a violation of all of them.

MR. REGAN: It is a violation of most of them, hearsay, primarily.

THE COURT: It is not a violation of most of them, either.

Q Were you able to identify the voice of Mr. Henry?

Donald J. Migliorati for Government, Direct.

A Yes, I was.

Q How were you able to identify the voice of Mr. Henry?

A When Mr. Henry and Agent Martin left the garage, I identified his voice as that voice having conversation with Agent Martin in the garage.

THE COURT: You didn't hear any voice in the garage, did you?

A Yes, I did, Your Honor. Agent Martin had a transmitter on him. The voice that discussed the purchase of the drugs in the garage was the same voice as the conversation which was outside of the garage where I did observe Agent Martin and Mr. Henry alone.

THE COURT: All right.

MR. REGAN: I would also like to make an objection that this is not the best evidence.

THE COURT: Objection is overruled.

MR. REGAN: Your Honor understands that the transcript of the tape would be the best evidence.

THE COURT: I also know that the testimony already was that the tape wasn't working.

Donald J. Migliorati for Government, Direct.

MR. REGAN: Not from this witness.

THE COURT: I don't care whether it was this witness. It is evidence in the case. Objection is overruled.

Q Now you were telling us that you had overheard Mr. Henry discussing something with Investigator Martin. What was that?

THE COURT: Ask him if the tape was working?

Q Was there a tape recording made of this transmission?

A No, sir.

Q Why not?

A Because the piece of the equipment which we were using, the transmitter-receiver was not ours, and it was on a reel-to-reel tape recorder, which was not working at the time.

Q The tape recording equipment was not working?

A Yes, sir.

Q Would you relate what Mr. Henry said, please?

A Yes, sir. Mr. Henry related to Investigator Martin that there was -- well, he assured him that there was twenty pounds there.

THE COURT: What did he say?

Donald J. Migliorati for Government, Direct.

A He stated there was twenty pounds there, and he was sorry, and that the original deal was for twenty-five pounds. Agent Martin then stated that he was not going to pay the original \$5,500 for twenty pounds, at which time they discussed price back and forth. They bickered on the price.

Q When you say "they," who was discussing it?

A Investigator Martin and Mr. Henry.

Q Was a price finally agreed upon?

THE COURT: If it was, it was done so by words. What was said?

A Mr. Henry stated that \$4,500 would cover the cost of the twenty pounds.

THE COURT: What was the answer, if any?

A Agent Martin said that he would take the twenty pounds for the \$4,500; however, he would return if his scale showed that there was not twenty pounds there.

THE COURT: Now that is what he said. How was there an agreement unless something else was said? You said there was an agreement. That means that they agreed, that there was a meeting of the

Donald J. Migliorati for Government, Direct.

minds.

A Yes, sir.

THE COURT: You have only told us what Martin said.

A Mr. Henry stated that there was twenty pounds there and that he would take \$4,500 for it, and Agent Martin agreed on it.

Q Detective Migliorati, I would like to direct your attention to the Exhibits that are in front of you there, G-2 through G-7 and G-9. Have you seen those Exhibits before?

A Yes, I have.

Q Where did you see those before?

A These Exhibits were packaged in the Rochester DEA Task Force Office, pursuant to the arrest of the three defendants at 1020 Sunset Trail.

Q On what date was that, May 30th?

A They were sealed on May 30th, 1974.

Q Subsequent to May 30th, 1974, did you, yourself, do anything with those Exhibits?

A Yes, I did.

Q What did you do?

A On May 31st, 1974, I removed them from the Monroe County Sheriff's Office vault and brought them over to the U. S.

Donald J. Migliorati for Government, Cross.

Attorney's Office here in the Federal Building in Rochester. I then packaged them with brown paper and tape and mailed them in the Federal Post Office on the first floor of this building to DEA Task Force Lab in New York City.

Q And under what method, or manner of mail, did you use to mail them?

A Registered, and return receipt requested.

Q And did you receive a return receipt?

A Yes, I did.

MR. WELCH: I have no further questions.

Thank you, Your Honor.

CROSS EXAMINATION

BY MR. REGAN:

Q Who was present when you removed them from the vault?

A Investigator Clayton Berrardi.

Q And what day and time was this?

A This was the following morning of the arrest, May 31st, 1974.

Q Who else was there besides you and Berrardi?

A I believe Special Agent Conley.

Q Anybody else?

Donald J. Migliorati for Government, Cross.

A To the best of my knowledge, I don't remember anybody else.

Q And it was you and you alone who brought them to the Federal Building?

A No. Investigator Conley was with me.

Q Did he stay with you until you mailed them?

A Yes, sir.

Q Were they in exactly that condition when you mailed them?

A No, sir.

Q What condition were they in?

A They were all sealed in this type of evidence bag (indicating). This is a substitute container here.

Q In other words, the container on Exhibit G-2 was not the container that you originally mailed to them, right?

A No, sir. That container is contained inside here (indicating).

Q Are all the other containers the same?

A Yes, sir.

Q Were there white bags?

A White bags.

Q White plastic bags?

A Yes, sir.

Q Then there were transparent plastic bags, right?

Donald J. Migliorati for Government, Cross.

A Yes, sir.

Q And was the quantity in each of those bags as diverse as the quantities are now before you in each of these bags?

A Yes, sir, I believe so.

Q Is that the way you originally saw them in the Monroe County Sheriff's Office?

A Yes, sir.

Q When did you first meet Mr. Henry?

A At the time of the arrest, approximately ten minutes after nine on the 30th of May, 1974.

Q Where were you sitting at the time of the conversations between Detective Martin and who you claim to be Mr. Henry?

A I was on a hill directly over the a-half-car garage, approximately eighty feet north of the garage entrance.

Q Eighty feet north of the garage entrance?

A Yes, sir.

Q Was your car visible from the garage entrance?

A No, sir. I was out of my vehicle in some bushes.

Q Were you looking south at the time?

A Yes, sir.

Q And it was ten minutes after nine?

A It was approximately ten minutes after nine when they

Donald J. Migliorati for Government, Cross.

exited the garage.

Q You couldn't hear what they were saying with your ears, could you, from that distance?

A I don't believe so, sir. I had an earphone in my ear.

Q Were you alone?

A No, sir. I was with Sgt. McGlory.

Q Only Sgt. McGlory?

A I believe so.

Q Detective Martin said it was dusk. Do you agree?

A Yes, sir.

Q Ten minutes after nine on May 30th, what exactly was the color of the clothing that Agent Martin had on?

A I don't recall, sir.

Q How about the color of the clothing that Mr. Henry had on?

A Again, I don't recall, sir.

Q Was there a third person with them at the time, at the trunk of that car?

A No, sir, I don't believe so.

Q There could have been, is that correct?

A Possibly, yes, sir.

MR. REGAN: I have no further questions.

MR. WELCH: I have no further

Donald J. Migliorati for Government, Cross.

questions.

Thank you, Your Honor.

(Witness excused.)

MR. WELCH: The United States
calls Michael Tsougros.

* * *

(At 12:55 P.M., a luncheon recess
was taken.)

- - -

Jonathan G. Klinkert for Government, Direct.

Rochester, New York

Monday, January 19, 1976

2:00 P.M.

J O N A T H A N G . K L I N K E R T ,

called as a witness by the Government, being first duly sworn,
testified as follows:

DIRECT EXAMINATION

BY MR. WELCH:

Q Would you tell the Court how old you are?

A Thirty-six.

Q Where do you live?

A 1161 Ayrault Road, Fairport.

Q In May of 1974 where did you live?

A 1020 Sunset Trail, Webster.

Q Could you pinpoint that for the Court? Where is 1020
Sunset Trail, Webster?

A It is on Bay Road -- I should say it is off Bay Road,
near Glen Edith. It is on the east side of Irondequoit
Bay.

Q Where were you employed in May of 1974?

A Pennwalt Corporation.

Q Where is Pennwalt Corporation?

Jonathan G. Klinkert for Government, Direct.

A 755 Jefferson Road.

Q Is that the pharmaceutical corporation?

A Yes. It is a division.

Q You were indicted along with the defendants here, Wayne Henry and Duane Baldwin, were you not?

A Yes.

Q And you have entered a guilty plea to a reduced charge, is that true?

A Yes.

Q And you are awaiting sentence?

A Yes.

Q I would like to direct your attention to May 30th, 1974, at your then home, 1020 Sunset Trail. Did you have occasion to see the defendant here, Wayne Henry, on that date?

A Yes.

Q And when did you first see Henry at Sunset Trail?

A It was after work.

Q If anything, what was he doing at that time?

A He came down to do some fishing.

Q And did you do some fishing?

A Yes.

Q Did Henry do some fishing?

A Yes.

Q Did you have occasion to see Duane Baldwin on that date?

Jonathan G. Klinkert for Government, Direct.

A Yes.

Q How long have you known Duane Baldwin?

A It will be about two and a half years now, I guess.

Q How did you know Duane Baldwin? In what capacity?

A When he came to work at Pennwalt.

Q Duane Baldwin worked at Pennwalt at the same time you did?

A Yes.

Q How about Wayne Henry? Did you know Wayne Henry?

A The same way.

Q Working at Pennwalt?

A Right.

Q Did you see Duane Baldwin on May 30th, 1974?

A Yes, I did.

Q And where did you first see him on that date?

A That night.

Q At about what time?

A At my house. I think it was eight thirty, a quarter to nine, around there.

Q Was it light or dark out?

A It was getting dusk. It was almost dark.

Q Had you had any conversation with Duane Baldwin prior to his coming to your house?

A He had called on the phone.

Jonathan G. Klinkert for Government, Direct.

Q What did he say?

A He asked me if I was going to be home.

Q What did you tell him?

A I said, "Yes."

Q Was there anything else said?

A He said he wanted to come down.

Q Did he say why he wanted to come down?

A For the purpose of making a deal.

Q What kind of a deal?

A To sell some resin.

Q Is that what he said, to the best of your recollection?

A Well, to sell a substance.

THE COURT: He called you?

A Right.

THE COURT: And he said he wanted
to talk about a substance?

A All right -- resin.

Q What did he say? What were his words is what we are trying to find out.

A That he wanted to use my property to complete this transaction, you know.

THE COURT: What transaction? We
don't know what you are talking about.

Jonathan G. Klinkert for Government, Direct.

A With whoever he was going to sell it to.

THE COURT: What we want to know is what he said to you. You are talking about a transaction. That doesn't mean anything.

A Okay. He wanted to sell what he thought were some drugs, a drug resin.

THE COURT: Is that what he said?

A I know that he had the resin before.

Q How did you know that?

A I had known it prior to that.

Q Had you had prior conversations with either him or with Wayne Henry?

A Yes.

Q Relate to us the substance of those conversations concerning this meeting that you were going to have.

A I didn't set up any meeting. He just asked if he could come down that night with the purpose in mind of bringing someone with him.

Q For what purpose?

A To make this transaction with this resin.

Q You said you knew what it was prior to that occasion, is that correct?

Jonathan G. Klinkert for Government, Direct.

A That's correct. I knew that he had it. Let's put it that way.

Q How did you know that? That is what we would like to know.

Did you see him obtain it? Did you have a conversation with him, or whatever? We would like to know that.

MR. REGAN: At this point I would like to make an objection to this line of inquiry, because it is obviously not binding or pertinent upon my client.

THE COURT: Objection is overruled.

MR. REGAN: I want it on the record because it has got nothing to do with Henry.

THE COURT: Objection is overruled.

Q Prior to this occasion on May 30th, 1974, when Duane Baldwin called you, and I think your terminology was "to set up this use of your property," had you had any conversation with Wayne Henry concerning this resin?

A Yes.

Q Relate that conversation to the Court, please?

A What did he say about it?

Q Yes.

MR. REGAN: Time and place, Your

Honor.

Jonathan G. Klinkert for Government, Direct.

THE COURT: What?

MR. REGAN: May I have the time
and place.

Q How many conversations about this resin did you have with
Mr. Henry?

A I think only one.

Q Where was that conversation?

A I don't know. I think at work.

THE COURT: When, with relation
to May 30th?

A It wasn't in relation to May 30th.

THE COURT: I know it wasn't, but
it was either some time around that time, and
I presume it had to be before May 30.

MR. REGAN: Your Honor is leading
the witness. I object.

THE COURT: Who is leading the
witness.

MR. REGAN: You are. I object.
You are leading the witness. I don't know
that he knows that.

THE COURT: I don't know anything
about it, either. That is what he is ask-

Jonathan G. Klinkert for Government, Direct.

ing.

MR. REGAN: I respectfully request--

THE COURT: I expressly rule that I am not leading the witness.

MR. REGAN: You say it was before the 30th of May, wasn't it?

THE COURT: It couldn't have been after it, or he wouldn't have been referring to it.

Q Was this conversation before May 30th, 1974?

A Yes.

Q How far before it?

A That I don't know.

THE COURT: About how long, a year, two years, five years? We don't know unless you tell us.

A Maybe a month.

Q What did he say?

A You know, just that they had this resin. That is all, you know, nothing to do with May 30th.

Q So at some prior occasion you were advised by Mr. Henry that they -- and who is the "they" you are referring to that had this resin?

Jonathan G. Klinkert for Government, Direct.

A Duane and Wayne.

Q Is that Duane Baldwin and Wayne Henry?

A Right.

Q And did Mr. Henry tell you what he, Mr. Henry, thought that resin was?

A I am not sure that he knew.

Q What did he tell you?

A I assumed that he thought it was an amphetamine.

THE COURT: Don't assume anything.

What did he say about it?

A That he thought it was an amphetamine resin.

Q What did he call this resin?

A He might have referred to it as an amphetamine resin.

THE COURT: Did he refer to it?

A I guess so.

MR. REGAN: I move to strike.

THE COURT: Strike it out.

Q What is your best recollection how he described this substance that you call a resin?

A It was to be used in making the amphetamines, and I guess he thought it was an amphetamine resin.

THE COURT: You say you guess it.

If you guess that, what do you base that on?

Jonathan G. Klinkert for Government, By the Court.

A Because I didn't believe it to be anything.

THE COURT: We are not asking about what you believed. We are trying to find out what Henry said.

A I don't think he thought it was an amphetamine.

THE COURT: We are not asking you what he thought. We are asking you what he said. You were talking about some subject, weren't you?

A Yes.

THE COURT: Now what was said between you and him?

A You mean regarding the resin? You lost me there. I don't follow what you are trying to get at.

THE COURT: You are talking about something, and I won't know what you are talking about unless you tell me.

A We are talking about resin.

THE COURT: You and Henry?

A Okay.

THE COURT: Not "okay." Don't agree with me. I am just trying to find out. Now what was said?

Jonathan G. Klinkert for Government, By the Court.

A Well, that Duane had a prospective buyer for this resin.
Is that what you want to know? Is that what you mean?

THE COURT: We want to know what
was said.

MR. REGAN: I object to any
further interrogation, either by you or by
counsel on this matter. It is constantly
repetitive.

THE COURT: Objection is overruled.
That is the least offense in the case.
You will be guilty of it and so will I and
so will counsel.

MR. REGAN: I think you ought to
stop trying to elicit from the witness the
heart of this case, that the witness knew
there was some kind of a drug.

THE COURT: Please don't advise
me. I'm not asking for your advice.

MR. REGAN: I am merely stating
an objection, Your Honor.

THE COURT: The objection is
overruled.

We are trying to find out what

Jonathan G. Klinkert for Government, By the Court.

the conversation was. That is simple,
isn't it?

THE WITNESS: I just told you
what the conversation was.

THE COURT: Tell us again, then.

A That Duane had a prospective buyer.

THE COURT: Who said that?

A Wayne knew that.

THE COURT: At the time of this
conversation, who was there? You were there.

A This was at work, right.

THE COURT: Who else was there at
that conversation?

A Just the two of us. We used to work together.

THE COURT: I understand that.
You and the defendant were present at that
time?

A Right.

THE COURT: Would you tell us what
was said, what you said and what he said?

A I don't recall anything other than the fact that --

THE COURT: You say "other than."
So you recall something, then? Tell us

Jonathan G. Klinkert for Government, By the Court.

what you recall.

A That Duane knew of someone that would be interested in buying this resin.

THE COURT: "Duane," and that is another defendant?

A Right.

Q But Wayne Henry told you this, is that what you are saying?

MR. REGAN: That is a leading question, Your Honor. Why doesn't he ask him what he said, like you do?

THE COURT: Objection is overruled.

THE WITNESS: I knew that from talking to Duane.

THE COURT: All we want to know is what was said. I can't make that any plainer.

Q What did Wayne have to say?

THE COURT: You and Henry were there now. Will you tell us what was said, what he said and what you said?

A I don't know what more out of the conversation you want.

THE COURT: Never mind "what more."

Jonathan G. Klinkert for Government, Direct.

Now start at the beginning. We fixed the time, and you had a conversation with this defendant Henry, and you were there, and he was there. Now we want to know what was said.

A I told you no more than the facts.

THE COURT: Never mind what you told us before. Tell us again.

A Okay, that Duane was looking or knew of a person interested in buying this resin.

THE COURT: Now Duane was another defendant?

A Right. I don't know anything else to tell you about it.

THE COURT: If that is all that was said, that is enough.

A Okay.

DIRECT EXAMINATION CONTINUED

BY MR. WELCH:

Q To your knowledge, where did this substance come from?

A It came from Pennwalt.

Q How do you know that?

A I was there at the time.

Q At what time, what date?

Jonathan G. Klinkert for Government, Direct.

A I don't remember the date.

Q Was it prior to May 30th?

A Yes.

Q And who else was present?

A Duane and Wayne and myself.

Q At Pennwalt Industries?

A Right.

Q And what did you see take place, if anything, in regard to this resin that we are talking about?

A Well, I was in the shop at the time. I didn't see anything take place, actually.

Q Then you just stated you had knowledge that this came from Pennwalt. What is the basis for that statement?

A I knew that it was taken from Pennwalt at that time.

Q How did you know that?

A Because I saw it.

Q You saw what?

A I saw a bag.

Q And was it the bag by itself, or was it someone --

THE COURT: Who had the bag?

A I don't remember which one had the bag.

THE COURT: Did you have it?

A I didn't have it.

Jonathan G. Klinkert for Government, Direct.

THE COURT: Then it was somebody else that had it?

A Right. It was either Duane or Wayne, and I don't remember which.

Q Now we started this line of inquiry by a telephone call on May 30th, 1974, from Duane Baldwin. For the record, is that the substance that we are talking about, his setting up arrangements to come to your house?

A Yes, it is.

Q Did he arrive at your house on May 30th, 1974?

A Yes, he did.

Q And who was with him, if you recall?

A Someone named Carmen and another person whom I have come to know as Ronald Martin.

Q An undercover police officer?

A Right.

Q When Duane arrived at your place, did he have the bag with him, or the substance with him?

A No.

Q Did there come a time when you saw the substance on your premises?

A (No response.)

Q Where is the first time you saw that substance on your

Jonathan G. Klinkert for Government, Direct.

premises? Describe that to the Court, please?

A It was brought into my garage.

Q By whom?

A By Wayne.

Q Wayne Henry?

A Yes.

Q Did you see where he got it from?

A In his car.

Q Whereabouts in his car?

A The trunk, I would assume.

Q Did you see that?

A No.

Q Did you at any time prior to May 30th see anything in his trunk?

A No.

Q After Henry produced this substance, was there any conversation that you were able to hear by anyone present at that time?

A I just heard something, you know, that there was some question about something about weight.

Q Tell the Court who said what, please?

A I don't remember who was haggling about the weight. I just remember that there was some question about the

Jonathan G. Klinkert for Government, Direct.

weight.

Q A question between whom?

A Agent Martin and either Wayne or Duane, one of the two.
I'm not sure.

Q I'm going to hand you what is in evidence as G-1, which appears to be a scale. Do you recall ever having seen that scale before?

A Yes.

Q Where did you see that before?

A It was present that night.

Q On May 30th, '74?

A Correct.

Q Was anyone using that scale on May 30th, 1974?

A I think there was an attempt to use it.

Q By whom?

A Again, I'm not sure who was trying to use it.

Q Were you trying to use it?

A No.

Q Was Agent Martin trying to use it?

A No. I don't think he was.

Q Was this fellow you called "Carmen" trying to use it?

A No, I don't think so.

THE COURT: Will you tell us just

Jonathan G. Klinkert for Government, Direct.

exactly what you saw and who was there?

There were three people there, weren't there?

A Right.

THE COURT: You have already fixed those. Tell us what you saw, what you observed. This, I take it, was in the garage, wasn't it?

A Right, and I was working on a motor, and I wasn't trying to pay attention to what they were doing.

THE COURT: Whether you were paying attention or not, can you tell us what you observed, if anything?

A I know that they brought the scale in, and there was some talk about that the scale didn't work right or it didn't operate correctly, and so they just decided not to use it. And there was a haggle over how much was there and how much the price was and so on. But who said what I'm not sure any more.

Q While all this haggling was going on, was Mr. Henry present?

A Yes.

Q Was Mr. Baldwin present?

A Yes.

Jonathan G. Klinkert for Government, Direct.

Q Do you know whether or not a price was ever agreed upon by anyone?

A Yes, I guess there was.

Q Who agreed upon a price?

A I guess Agent Martin, and either Duane or Wayne. I don't know.

Q At any time prior to May 30th or on May 30th, 1974, did you ever have any occasion to handle this substance yourself?

A No.

Q Did you handle the bag in which the substance was contained?

A No.

Q Do you have any knowledge of how it got into the bag in which it was contained?

A No.

Q You did not put it into any bag or bags, is that correct?

A Yes.

Q Were you to receive any payment for your part in this scheme?

A Yes.

Q How much?

A A thousand dollars.

Q Was Mr. Henry to receive any payment for his part in the

Jonathan G. Klinkert for Government, Direct.

scheme?

A Yes, I guess so.

THE COURT: What do you mean you
"guess so"?

Q Do you know?

A Yes. I don't know how much.

MR. REGAN: I move to strike.

THE COURT: Strike it out.

MR. WELCH: If Your Honor please,
I would request permission to lead this
witness somewhat. He is obviously a hos-
tile witness. He is a co-defendant here.

THE COURT: It is not obvious to
me he is a hostile witness. It is obvious
to me he is not a very good witness, but
lots of people aren't good witnesses. That
doesn't mean they are hostile.

Q Mr. Klinkert, at any time did you ever make a statement
to anyone concerning any payment to Mr. Henry for these
substances?

THE COURT: I suppose you mean a
written statement, don't you?

MR. WELCH: No, I don't mean that.

Jonathan G. Klinkert for Government, Direct.

Your Honor.

THE COURT: Then say so. Did you ever talk to anybody?

Q To refresh your recollection, did you talk with me this past Saturday?

A Yes.

Q Didn't you advise me that Mr. Henry was to receive one-half of the profits?

A No. I told you that I assumed that he was.

Q What is the basis for that assumption?

A He wouldn't be doing it for nothing, would he?

Q Did you have a conversation with him?

THE COURT: Supposing he wouldn't be doing it for nothing. How do you conclude that he was going to get half of it?

A I don't know. I don't conclude that.

Q You were to be paid some money?

THE COURT: You said you assumed he was going to get half of it?

A Right.

THE COURT: That means you came to the conclusion in your own mind that he was going to get half of it, and he asked

Jonathan G. Klinkert for Government, Direct.

you on what you based that, and you said
you don't know.

Q Is there something that someone said to you, or that you
saw that made you reach that conclusion or that assumption?

A No. There are three people there -- okay? How would you
divide up something like that?

THE COURT: Naturally, you would
say one third, wouldn't you?

Q And how much were you to receive?

A I told you before, a thousand dollars, so that would
leave half of whatever was left.

Q For who? For each of the other two people?

A That is how I arrived at what I said.

THE COURT: You mean half of what
was left?

A Right, correct.

THE COURT: That is clear to me
now.

MR. REGAN: On the witness' own
testimony, I move to strike it. It is an
assumption.

THE COURT: Motion denied.

MR. WELCH: I have no further

Jonathan G. Klinkert for Government, Cross.

questions of Mr. Klinkert, Your Honor.

CROSS EXAMINATION

BY MR. REGAN:

Q How long did you work for Pennwalt Corporation?

A Ten years.

Q What did you do there?

A I was a maintenance mechanic.

Q As a maintenance mechanic, what did you do?

A I worked on plumbing, electrical and machinery, to do with the plant operation, air conditioning and so on.

Q You worked there ten years?

A Right.

Q And you got into practically every part of the production area, didn't you?

A Yes.

Q You got into every part probably of the office spaces from time to time?

A Correct.

Q And you knew the building and the layout pretty well, didn't you?

A Yes.

Q And you knew where the receiving docks were?

A Right.

Jonathan G. Klinkert for Government, Cross.

Q And the storage warehouses?

A Right.

Q You knew where they kept controlled substances, narcotics, drugs, didn't you?

A I did.

Q And you knew where they kept substances that they used to mix with those substances?

A Yes.

Q How many times did you participate in stealing any of the production or products that Pennwalt made? And you can answer this "once" or "more than once," as far as I'm concerned.

A You mean anything?

Q Anything at all -- I don't mean pencils and pens -- I mean pharmaceuticals or drugs. How many occasions, once or more than once, did you engage in removing such substances from the premises?

A I didn't.

Q You never did, right?

A I had no use for such things.

Q In your previous statement before Mr. Larimer, who was Assistant United States Attorney at the time, you mentioned that Duane Baldwin had taken "stuff," as you

Jonathan G. Klinkert for Government, Cross.

called it, more than once. Do you recall saying that?

A Yes.

Q When did you first meet Mr. Baldwin?

A When he came to work. I don't know what year, but a year or so prior to that. That is as close as I can recall.

Q You mean a year or so prior to the time he was fired?

A Correct.

Q And he was fired in April of 1974, isn't that correct?

A Yes.

Q He was fired some almost two months before this transaction took place at your home on May 30th, isn't that true?

A It is true.

Q At the time Mr. Baldwin and Mr. Henry were involved in removing a substance from the premises, can you tell me whether this was prior to Mr. Baldwin's dismissal, or subsequent to Mr. Baldwin's dismissal?

A Prior.

Q How long prior?

A Several weeks.

Q And in your testimony when you said, "I had known Dwane had taken other stuff," the word "other" meant other than what Henry and Baldwin had taken?

A Correct.

Jonathan G. Klinkert for Government, Cross.

Q When did it first come to your attention that Baldwin had taken any substances?

A Three, four months prior.

Q Prior to his dismissal?

A Yes.

Q Was it part of your duties to report this?

A I should have, yes. I suppose I should have.

Q But you did not?

A I never turned anyone in at the plant for a lot of things that I saw.

Q Fine, and I wouldn't comment on that.

You didn't turn in Baldwin?

A Correct.

Q When you say "about four months prior to April of 1974," you mean some time in late 1973 it came to your attention that Baldwin was taking materials?

A Yes.

Q Did you learn what he was taking?

A Some amphetamines, some substances that I don't even know that he knew.

Q That he knew what?

A I don't know that he knew what he took.

Q Did he admit this to you in conversations?

Jonathan G. Klinkert for Government, Cross.

A Yes.

Q Did you have conversations with Henry about taking substances?

A Regarding who?

Q About his taking any substances from Pennwalt?

A No, we never had any conversations, because as far as I knew, he never took anything prior to this.

Q Prior to this one occasion?

A Right.

Q And your testimony is that you never took anything at any time, ever, period, correct?

A Right.

Q Now you also testified that in respect to the warehouse, the open warehouse, you knew what was kept there, isn't that true?

A That is true.

Q And the open warehouse, was that subjected to stringent security?

A No.

Q And many people came and went within that area, is that true?

A That is true.

Q I show you Government's Exhibit 6 and Government's

Jonathan G. Klinkert for Government, Cross.

Exhibit 7, and I ask you if by observing those two Exhibits you can tell me if you ever saw any substance physically which looked like that in the open warehouse?

A Yes.

Q And do you know what they did with it?

A It was a raw material retention area.

Q And it was to be used in what?

A In the manufacture of amphetamine and phentermine capsules.

Q Are you familiar with the location of Warehouse No. 1?

A Yes.

Q Would you describe to me about the size of the room, Warehouse No. 1?

A About three times this room (indicating).

MR. REGAN: And this room may be --

THE COURT: It is sixty by thirty-nine.

Q Sixty by forty, or sixty by thirty-nine?

A Yes.

Q And you would say it would be one hundred and eighty feet long?

A Yes.

Q And three times as wide?

A Approximately, and maybe about twice as wide, and again,

Jonathan G. Klinkert for Government, Cross.

about twice as long.

Q When you saw substances similar to those in the Exhibits in front of you, how were they packaged?

A They were in fiber drums.

Q What size would the drums be?

A Fifty-five gallons.

Q Did you ever hear of the term "methaqualone" in all of your ten years of working there?

A Never.

Q Do you know whether Pennwalt manufactured methaqualone in 1974?

A Not to my knowledge.

Q You did tell Mr. Baldwin and Mr. Henry at some time after they allegedly took this substance that you believed it was an inert rosin, isn't that true?

A That is true.

Q Upon what facts did you make that statement? What did they tell you that led you to believe that?

A Duane had seen a person from the Control Lab check out these drums, and what they check it for is purity, I guess, and he wrote on the slip that it was -- I don't know -- amphetamine or phentermine resin, or whatever, and he got the idea it was already an amphetamine resin,

Jonathan G. Klinkert for Government, Cross.

but it wasn't.

Q Who is "he"? Ewane?

A Ewane.

Q But, in fact, it was the resin that was used as the base, isn't that true?

A That is true.

Q Did they also tell you from what area the resin had been taken?

A Yes.

Q What area did they tell you it had been taken from?

A It was an open raw materials area.

Q A warehouse, like Warehouse 1, right?

A Correct.

Q And did you then tell them that that was an inert rosin and not an amphetamine substance?

A To the best of my knowledge.

Q Did you believe it to be an amphetamine substance?

A No.

Q What did you believe it to be?

A Just a resin to be, you know, made into -- in other words, a resin without the drug added.

Q When Baldwin was fired, when did you first learn the fact that he had been fired?

Jonathan G. Klinkert for Government, Cross.

A I had been off on a week vacation, and when I came back, it was told that he had been fired.

Q Did you learn the reason for his dismissal?

A Yes.

Q What was it?

A He had been caught trying to sell some things that he had taken from there, some drugs or whatever.

Q From the time he was fired to the time that he called you and asked to come over to your house, how many times did you see him, Baldwin?

A I don't know, a couple of times, I guess.

Q Where?

A I guess he had come down a couple of times.

Q To your house?

A Yes.

Q Was he a friend of yours, a social friend?

A Yes.

Q When he came down to your house the first time, did he mention the resin, or selling the resin?

A I don't know if it was the first time.

Q Let's abbreviate this. When did he suggest to you that he would pay you one thousand dollars?

A I guess I would say a couple of weeks before.

Jonathan G. Klinkert for Government, Cross.

- Q Was it during the first conversation that you had with him at your house after he was fired?
- A That I don't recall.
- Q But it was several weeks before the actual transfer occurred and your arrest, is that true?
- A That is true.
- Q And who first mentioned the figure of a thousand dollars?
- A I don't know. I don't remember that, either.
- Q What were you to do for the thousand dollars?
- A Let my property be used for the transaction, because it was in a secluded area.
- Q Did he ask to store the substance on your property?
- A No.
- Q When did the substance arrive at your property?
- A The night of the transaction.
- Q Not earlier?
- A No.
- Q Did you mention to him at the time that he offered to pay you a thousand dollars that it was risky business to sell inert substances as if they were drugs? Did you say that to him in words or substance?
- A No, I don't remember saying that.
- Q Did you know that the one thousand dollars was to come

Jonathan G. Klinkert for Government, Cross.

from the sale of this substance?

A Correct.

Q And you said that you believed the substance was inert?

A That is true.

Q Then I do not understand upon what facts you also believe that it could bring a sum of money in the vicinity of a thousand or more?

A How did I?

Q Yes. You did believe, did you not, that he was going to sell this as a drug?

A That is true -- I don't know, but whoever he had lined up to sell it to thought it was whatever he claimed it was.

Q And you were making no disclaimers one way or the other, right?

A I wasn't involved with the transaction.

Q You had nothing to do with the negotiations for the sale?

A Correct.

Q At the time of the evening of May 30th, who arrived first?

A You mean discounting Wayne?

Q No, I certainly don't mean "discounting Wayne."

A I already stated that he came down after work.

Q When did you return home from work? What time of day?

A Probably when it was five thirty.

Jonathan G. Klinkert for Government, Cross.

Q Did Wayne come with you?

A No. He came in his own car.

Q How long after you arrived home did Wayne come?

A A half hour, maybe.

Q At work had you discussed with Wayne the fact that you were going to see him that night?

A Yes, we talked about that he was going to come down.

Q Did you discuss the reasons for his coming down?

A He originally came down to go fishing.

Q He arrived about six o'clock, you say?

A Yes.

Q How long was he fishing?

A Until about seven thirty, I guess.

Q Were you there when he first arrived?

A Yes.

Q Did you see this bag, this gray bag (indicating) at the time Wayne Henry arrived at your house?

A No.

Q Have you ever seen that gray bag before?

A I don't remember seeing that gray bag that night.

Q Isn't this the gray-type bag they use at Pennwalt?

A He had much bigger and much thicker bags.

Q Did you see this yellow bag that night?

Jonathan G. Klinkert for Government, Cross.

- A I recall that the bag was either brown or yellow. I don't remember anything about a gray bag.
- Q Where was the bag when you first saw it?
- A On my garage floor.
- Q And what time was that when you first saw it?
- A Eight o'clock.
- Q It had not been stored in your house, correct?
- A That's correct.
- Q And how did it get to the floor of your garage?
- A Wayne brought it in.
- Q Did you see that happen?
- A I think I saw him bring it in. I am not sure.
- Q But in any event, he arrived at six o'clock?
- A Right.
- Q So it laid on the floor of your garage for approximately two hours?
- A No -- well, maybe it did.
- Q Did you ever open the bag?
- A No.
- Q Did you ever open the bag at Pennwalt?
- A No.
- Q Did you have a scale at your premises other than the scale that Mr. Baldwin brought with him?

Jonathan G. Klinkert for Government, Cross.

A Yes. I have an old scale I used for motor work.

Q And that was in the garage, was it not?

A Yes.

Q You and Mr. Henry did not weigh the bag when he brought it?

A No.

Q Had you had any conversations with Henry over the telephone prior to May 30th, 1974, about this transaction?

A I don't think so.

Q Had you had any conversations with Henry prior to May 30th, 1974, about the quantity and the sum of money to be secured in the transfer of this substance?

A I heard some figures.

Q Prior to May 30th, 1974?

A Right. I heard it was something in the order of fifty-five hundred dollars.

Q From whom did you hear that?

A I think I heard it from Duane.

Q How long before May 30th did you hear it from Duane?

A I think it was that night.

Q Well, I asked you --

A Okay. I think he was kicking a figure like that around before that at some time, maybe in the last couple of

Jonathan G. Klinkert for Government, Cross.

weeks before that.

Q Duane Baldwin was doing that?

A Yes, right.

Q At the Pennwalt plant in 1974, what kind of security arrangements existed for the storage of narcotics, to your knowledge?

A They have an ultrasonic alarm system, which is connected to ADT.

Q What is that?

A (No response.)

Q I don't know what "ADT" is.

A It is a detection company that when the alarm comes into them, they immediately send police to wherever that alarm has been broken.

Q Is there any person guarding the areas?

A Each building has a guard on at night.

Q Are they under lock and key, as far as you know, as a maintenance engineer?

A The narcotics is kept in a room which is locked and in a vault which is locked, plus it has this ultrasonic alarm, and it has a photoelectric alarm. In other words, you have to be a mouse to get in.

Q Do you have the combination?

Jonathan G. Klinkert for Government, Redirect.

A No.

Q Did you know whether or not Mr. Henry or Mr. Baldwin had the combination?

A They did not.

MR. REGAN: Your witness.

REDIRECT EXAMINATION

BY MR. WELCH:

Q Mr. Klinkert, pursuing this alarm business and security precautions business, Mr. Regan's question was directed to narcotics, and you indicated that they are under tight security.

Was there ever any substance that was not an inert resin but some sort of a pharmaceutical substance that was not under tight security?

A You mean something of a non-narcotic or non-amphetamine or something base?

Q That has been made into a drug, not necessarily a narcotic drug, but had been made into something that was not just inert resin?

A In an unguarded area?

Q Yes.

A No. Everything of any scheduled nature was under security, you know.

Jonathan G. Klinkert for Government, Redirect.

Q How about in the cellar storage area? Was there adequate security down there to protect the things stored in that area?

A Not at one time, no.

Q At what time was there not adequate security?

A About two years ago.

Q About the time that this theft took place?

A You mean this theft?

Q Well, any theft by Duane Baldwin?

A Yes.

Q And what was in the cellar storage area?

A It was apparatus and things from the Research Building.

Q Were there controlled substances in that area?

A That I don't know. There were substances, and what they were, I don't know.

Q You testified on cross examination, and I just want to ask you if you are sure of this answer, that you thought that Duane had stolen this material in 1973. Are you sure of that answer?

A Are you talking about this material (indicating)?

Q Yes.

A In 1973?

Q Yes.

Jonathan G. Klinkert for Government, Redirect.

A No. It was only prior to our arrest, like within a couple of months.

Q So in 1974?

A Correct.

Q Do you have any chemical training?

A No.

Q Did you ever have any on-the-job training in chemistry or pharmaceutical sciences?

A No.

Q Did you ever conduct any tests yourself on that material?

A No, I have not.

Q Do you know for a fact what that material is?

A This material (indicating)?

Q Yes.

A No.

Q Did you know for a fact what material it was that Duane Baldwin stole?

A No, I don't.

Q You testified on cross examination concerning a figure that Duane had mentioned prior to May 30th, 1974. Was anyone else present when Duane Baldwin mentioned this figure?

A No. I think it was when we were working together, just

Jonathan G. Klinkert for Government, Redirect.

the two of us.

Q Was Wayne Henry working with you at that time?

A I don't think he was with us at that time.

Q Prior to May 30th, 1974, did you ever discuss with Wayne Henry what Duane was going to charge for that substance?

A Yes, I think so.

Q When?

A I don't recall exactly when.

Q Did you tell him, or did he tell you what the figure was going to be?

A I'm not sure which way it was.

Q Are you sure that someone mentioned the figure, though?

A Yes, I'm sure of that.

Q And you knew that it was going to be resold to someone by Duane?

A Correct.

Q Did Wayne Henry say anything to you to make you believe that he knew it was going to be resold by Duane?

A At some time. I don't know exactly when.

Q Was it on May 30th?

A It might have been prior to that, sometime prior to that.

MR. WELCH: I have no further questions. Thank you, Your Honor.

Jonathan G. Klinkert for Government, Recross.

RECROSS EXAMINATION

BY MR. REGAN:

Q Isn't it true that you knew that Baldwin had taken substances on more than one occasion?

A Yes.

Q Some of those occasions were more than three or four months before he was dismissed, isn't that true?

A True.

Q But on direct and cross examination, you said you know of only one time in which Henry was involved?

A Right.

Q And that is the time also that you became involved?

A Right.

Q When you gave this prior statement under oath, you said in words or substance, "Besides, they pointed out to me what drums this stuff came from."

Is that true? Did Henry and Baldwin point out to you in what drums this substance came from?

A Yes.

Q Where were those drums located?

A In the corner of this raw materials area.

Q The open warehouse?

A True.

Jonathan G. Klinkert for Government, Recross.

Q Not the cellar?

A No. There weren't any such things in the cellar.

Q Mr. Welch asked you about what types of substances may have been in some kind of a cellar. Do you remember that question?

A Right.

Q They didn't point out to you, that is, Henry and Baldwin didn't point out to you, that they had removed that substance from the cellar, did they?

A No.

Q It was from an open warehouse, correct?

A Right.

Q And that was one of the facts you used, was it not, to tell them that it was an inert rosin, isn't that true?

A That is true.

MR. REGAN: Your witness.

MR. WELCH: I have nothing further of this witness.

Thank you, Your Honor.

THE COURT: Call the next witness.

MR. WELCH: The United States calls Duane Baldwin.

Duane E. Baldwin for Government, Direct.

D U A N E E. B A L D W I N,

called as a witness by the Government, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. WELCH:

Q Mr. Baldwin, how old are you?

A Twenty-one.

Q Where do you live?

A 319 Knickerbocker Avenue.

Q Is that in the City of Rochester?

A Yes.

Q Where did you live in May of 1974?

A 121 Avenue E.

Q And in what city is that?

A Rochester, New York.

Q Do you know Wayne Henry, the defendant herein?

A Yes.

Q How long have you known Wayne Henry?

A About six months, when I worked with him at Pennwalt Corporation.

Q When did you first meet him?

A I don't exactly remember the date.

Q Did you know him in May of 1974?

Duane E. Baldwin for Government, Direct.

A Yes, I did.

Q In May of 1974 did you know Jonathan Klinkert?

A Yes.

Q For how long have you known Jonathan Klinkert?

A Since I started at Pennwalt Corporation.

Q When did you start at Pennwalt?

A June, 1973.

Q For how long did you work at Pennwalt?

A One year.

Q Is that an exact figure or an approximate figure?

A An approximate figure.

Q How did your employment at Pennwalt end?

A I was terminated because of suspicion of a drug theft.

Q Stealing from Pennwalt?

A Right.

Q When did that take place that you were fired there?

A April 1st.

Q Of what year?

A '74.

Q You have been charged with Wayne Henry and Jonathan Klinkert in a three-Count Indictment, is that true?

A Yes.

Q And you have entered a guilty plea to one Count of that

Duane E. Baldwin for Government, Direct.

Indictment?

A Yes.

Q And you are awaiting sentence at this time?

A Yes.

Q I would like to direct your attention to May 30th, 1974.

On that date did you have occasion to meet with Ronald Martin, Wayne Henry and Jonathan Klinert?

A Yes.

Q Where did that meeting take place?

A Sunset Trail, at Jonathan Klinert's house.

Q Would you tell the Court what took place when you met at Sunset Trail?

A When we first arrived, there was a brush fire of some sort at the top of the hill, so we waited at a gas station parking lot.

Q Let me interrupt. How did you arrive at the scene?

A Agent Martin's car.

Q At the time did you know that Agent Martin was, in fact, an undercover police officer?

A No, I did not.

Q Do you know how Wayne Henry or Jonathan Klinkert arrived at the scene?

A No, I do not.

Duane E. Baldwin for Government, Direct.

Q Were they there when you arrived at 1020 Sunset Trail?

A Yes.

Q When I interrupted, you just said there was a fire or something on the way in there, so continue telling us what took place.

A We waited at a gas station parking lot, I think it was, for a half hour, across the street from Sunset Trail, until the fire trucks and firemen had left.

Q When you say "we waited," who was that?

A Agent Martin, myself and Carmen Martucio.

Q Then what took place after the fire?

A After the fire we proceeded down the hill to Jonathan Klinkert's garage, and Agent Martin expressed this fear that this might be a rip-off.

Q What does that mean?

A That we might be taking him for his money, that it might be more or less stealing it from him.

Q What did you respond, if anything?

A I said, "Wayne Henry and Jonathan Klinkert were respectable people, and it was a fair deal, a straight deal."

Q You were telling us in narrative fashion what took place. Will you continue?

A We then proceeded to the garage, all three of us, Agent

Duane E. Baldwin for Government, Direct.

Martin, Carmen and me, and we entered the garage, and Agent Martin wanted to see the drugs. So Wayne Henry produced the drugs from a cabinet, if I'm not mistaken, in the garage, and showed them to Agent Martin.

Q When you say "he showed it," just exactly how did that go? What did he do? When you say "showed it," what do you mean by that?

A He opened the bag, and he showed him the merchandise.

Q What kind of a bag was it?

A As a recall, it was a brown plastic garbage bag.

Q Did you see the inside or the contents of that plastic garbage bag?

A Yes.

Q You, yourself, did on May 30th?

A Yes.

Q What was inside?

A Brown resin.

Q Had you seen that brown resin before?

A Yes.

Q Where had you seen that before?

A Pennwalt Corporation.

Q Where was it when you saw it at Pennwalt?

A I seen it in the manufacturing process. I seen it being

Duane E. Baldwin for Government, Direct.

stored in the warehouse.

Q Now we are talking about the particular brown resin that Wayne Henry showed to Agent Martin?

A It was stored in the warehouse a little ways from the workshop where we worked.

Q Was anyone with you when you saw this for the first time, this particular resin that we are talking about?

A Not that I recall, no.

Q Did there come another time that you saw this resin at Pennwalt?

A Yes.

Q At any time did you see anything with this resin in Pennwalt?

A Earlier I had sold some that I had stolen from the basement at Pennwalt Corporation and had sold some to Carmen Martucio. And he got arrested for the possession of this phentermine resin. And in the end, Carmen Martucio told Agent Berrardi that I supplied him with some phentermine resin, and he came to me and searched my house.

Q Who searched?

A Agent Berrardi searched.

Q Was this on May 30th?

A No. This was earlier. I had stolen some several months in advance.

Duane E. Baldwin for Government, Direct.

- Q How was this particular resin that was in the bag, on the night of May 30th, how did that get out of Pennwalt?
- A Me, Wayne Henry and Jon Klinkert took it out of Pennwalt.
- Q How did you do that?
- A We waited until after four thirty when most of the people had gone home, and we went into the warehouse where the barrels -- I think they were seventy-five gallon barrels where the resin was stored, and we opened one of the barrels up and scooped it into a brown plastic bag.
- Q Tell the Court who was doing what here?
- A Mr. Klinkert kept watch and me and Henry took the drugs out of the barrel.
- Q When you say "me and Henry took the drugs out of the barrel," just who did what?
- A As I recall, I held the bag and Mr. Henry scooped it out.
- Q This is defendant Wayne Henry in the court here this afternoon?
- A Yes.
- Q How many bags did you fill, if more than one?
- A I think it was two bags.
- Q What then did you do with these two bags of substance?
- A We then left the plant with the substance.
- Q Did you leave in the same car together?

Duane E. Baldwin for Govern.. ent, Direct.

A No. We took our own vehicles.

Q Who had the substance then?

A As I recall, Wayne Henry.

Q How did not?

A No.

Q When did this theft take place?

A I'm not exactly sure.

Q Let's fix it with relation to the date you were fired.

You were fired on April 1, 1974?

A Correct.

Q It had to take place prior to that, is that correct?

A Yes, it did.

Q Was it in 1973 or 1974?

A I think it was near the end of February.

Q Of what year?

A '74.

Q February of '74?

A Yes.

Q You said Mr. Henry took the substance with him when you left Pennwalt the night that it was stolen?

A Yes, sir.

Q Did you see it again any time thereafter?

A No, I did not.

Duane E. Baldwin for Government, Direct.

Q At any time after it was stolen from Pennwalt, did you re-bag it or put it into small bags?

A No, I did not.

Q Do you know who did, if anybody?

A No.

Q Prior to May 30th, 1974, did there come a time when you had any conversation with Mr. Henry concerning this substance?

A Would you repeat that, please?

Q Prior to May 30th, the day of your arrest, was there any time when you had a conversation with Wayne Henry concerning this substance?

A Not that I recall, no.

THE COURT: When you were bagging it, you must have talked with him then?

A Yes.

Q After that, when he went away with the stuff, did you ever talk to him about that stuff between that date and May 30?

A Yes, I did, yes.

Q Would you relate to the Court the substance of that conversation with Mr. Henry, please?

A It was concerning when the deal was supposed to go through,

Duane E. Baldwin for Government, Direct.

when we were supposed to sell the substance.

Q Do you remember what you said and what Mr. Henry said?

THE COURT: First, when was it
and where was it?

Q When was this conversation?

A I don't remember the exact date.

THE COURT: Approximately?

A Approximately?

THE COURT: Yes.

A Approximately two weeks before May 30th.

THE COURT: Where was it?

A It was at Durand Eastman Park.

Q Was anyone else present?

A No.

Q What did Mr. Henry say and what did you say?

A It wasn't a long conversation. It was just he wanted to
know when I was going to be able to get Carmen Martucio
together, to be able to put the deal through.

Q Had you discussed this "Carmen" person at a prior occasion?

A No.

Q How did he know about this "Carmen" person?

A I told him that there was a certain person interested in
buying the substance.

Duane E. Baldwin for Government, Direct.

Q When did you tell him that?

A This was before we had gotten the substance.

Q Prior to stealing it, you had a conversation about it?

A Yes.

Q Did he respond anything to you when you told him why you were stealing it?

A Yes. We stole it for the money, for the profit.

Q In addition to those two conversations that you told us about already, did you have any other conversations with Mr. Henry about this substance?

A Not that I can recall, no.

Q I don't know if there was any conversation, and if there was, would you please relate to us the substance of the conversation while you were packaging this material at Pennwalt, while you were taking it? Was anything said on that day?

A We were taking it for sale.

Q Is that your recollection, that that is what you discussed that day?

A Yes.

Q Do you remember his exact words, or your exact words?

A No, I don't.

THE COURT: It doesn't have to be

Duane E. Baldwin for Government, Direct.

exact, but in substance.

A I can't remember.

Q What was the substance of your conversation when you were taking it?

A (No response.)

Q What were you talking about when you were taking it?

A Nothing while we were taking it. We were in too much of a hurry.

Q You did not discuss the purpose for taking it, then?

A The purpose for taking it was for resale.

THE COURT: You had talked about

that before?

A Yes.

Q And you talked about it after the sale two times?

A Yes.

Q When you were talking with Mr. Henry about the substance, what did you call it?

A Phentermine resin.

Q What did he call it?

A The same, as I recall.

Q Is that the only terminology you used for it?

A Yes.

Q You never called it by a vernacular name or colloquial

Duane E. Baldwin for Government, Direct.

name --

THE COURT: Particularly, he means "stuff." Did you call it "stuff"?

A Yes, maybe "stuff."

Q Did you ever call it "speed"?

MR. REGAN: That is a leading question, and I think if you are going to imply knowledge with a lot of leading questions from a prosecutor, at least it ought to be called to the Court's attention --

THE COURT: That is not what I am ruling on for the moment. I am ruling on this question.

MR. REGAN: This is a leading question.

THE COURT: Objection is overruled.

Q The question is: Did you or Mr. Henry ever call it "speed"?

A Yes, I think we did.

Q Both of you?

A Yes.

Q Do you remember when?

A No, I don't.

Duane E. Baldwin for Government, Direct.

Q Was it during this conversation before you stole it, or during the conversation at Durand Eastman, or was it on May 30th?

A I think it might have been the conversation at Durand Eastman.

Q When you stole it, did you know what it was?

A No, I did not. I thought it was phentermine resin. I didn't know that it was methaqualone.

Q When you say "phentermine resin," what does that mean?

A I don't know. It is what they put in the capsules.

Q It is the finished product?

MR. REGAN: He is leading him again, and I object to that.

THE COURT: There isn't a doubt about it that that capsule is a finished product.

He already referred to a capsule, and that, to me, means a finished product.

MR. REGAN: No, he referred to a resin, Your Honor.

THE COURT: Objection is overruled.

Q Mr. Baldwin, I'm trying to find out what you and Mr. Henry thought this material to be. From what you saw and from

Duane E. Baldwin for Government, Direct.

what you heard Mr. Henry say, would you tell us what you and he thought it was?

MR. REGAN: No. I object.

THE COURT: I sustain the objection. He can't tell what Henry thought. He can tell what he said.

Q Can you tell us what he said in that regard?

A No, I cannot.

THE COURT: Did he at any time refer to the substance?

You were talking about something that had been stolen from Pennwalt?

A Yes.

Q Did either you or he call it by any name?

A "Phentermine resin," and that is the only thing I can think of, or "phentermine" just without the "resin."

THE COURT: What?

A Just plain "phentermine."

Q At any one of these discussions with Mr. Henry, was price ever discussed?

A Yes.

Q Tell the Court what was said?

THE COURT: And when.

Duane E. Baldwin for Government, Direct.

A As I recall, we agreed upon trying to get the highest possible price.

THE COURT: When and where?

A Durand Eastman Park.

Q That was a couple of weeks before the arrest on May 30th. And what, if anything, was said?

A As I recall, we said we should try to get as much as possible, which was about eight thousand dollars.

Q Is that what you said?

A That is what we both agreed upon.

Q Let's go right to May 30th, 1974. When Agent Martin arrived and you said Mr. Henry produced the substance and showed it to Agent Martin, what, then, took place?

A Agent Martin looked at the substance, and he said, "It looks like its shorter," that it wasn't enough.

Q Let me direct your attention to what has been marked in evidence as G-1. Have you seen that scale before?

A Yes.

Q Where have you seen that before?

A This was my scale.

Q Did you see that scale on May 30th, 1974?

A Yes. I had brought it with me.

Q Did you do anything with that scale on May 30th?

Duane E. Baldwin for Government, Direct.

- A Yes. I attempted to weigh the substance, but I couldn't get the scale to work. I didn't know how to operate it.
- Q When was this?
- A This was during the sale, just before the attempted sale.
- Q Who was present while you were attempting to weigh it?
- A Wayne Henry, Jonathan Klinkert and Agent Martin.
- Q Were you successful in weighing it?
- A No.
- Q Had you used the scale before?
- A No.
- Q Where did you get it?
- A I purchased it from Carmen Martucio.
- Q While you were attempting to weigh this, was there any conversation going on?
- A As I recall, Agent Martin and Wayne Henry were discussing something about the price of the resin.
- Q Tell us what was said.
- A I think what Wayne Henry said is that he wanted \$5,500, and he said the weight was all there, that there were twenty pounds, and Agent Martin said, "\$4,500."

THE COURT: It is three thirty.

We will take a recess.

(Recess from 3:30 P.M. to

3:45 P.M.)

Duane E. Baldwin for Government, Direct.

DIRECT EXAMINATION CONTINUED

BY MR. WELCH:

Q Mr. Baldwin, just before the recess, I asked you what, if anything, was said while you were weighing this substance. Had you had a chance to finish your answer?

A Yes, as I recall.

Q When Agent Martin and Mr. Henry were discussing the price, where was Mr. Klinkert?

A As I recall, he was working on a car engine.

Q Was he participating in the conversation?

A No, I don't think so.

Q Were you participating in the conversation?

A Yes.

Q What did you say?

A I don't remember.

Q Were there any other times in addition to the time that you have already testified to, that you and Mr. Henry took substances from Pennwalt laboratories?

A No, there was no other time.

Q Were there other times when you, yourself, took substances from Pennwalt?

A Yes.

Q Were there any other occasions when you and Mr. Henry

Duane E. Baldwin for Government, Cross.

sold any substances obtained from Pennwalt?

A No.

Q This was the only time?

A Yes.

MR. WELCH: I have no further
questions, Your Honor.

CROSS EXAMINATION

BY MR. REGAN:

Q Are you married, Mr. Baldwin?

A No, I am not.

Q Do you use drugs?

A No, I do not.

Q On your direct examination you testified about having
sold some substances to a Carmen Mertucio on a prior
occasion, that is, an occasion not involved in this case,
correct?

A Yes.

Q Then you testified that Agent Berrardi searched your
home on Avenue E?

A Yes.

Q With whom do you live on Avenue E?

A I lived then with my girlfriend on Avenue E.

Q At this time were you employed at Pennwalt?

Duane E. Baldwin for Government, Cross.

A Yes.

Q So that it must have been after June, 1973, when you sold Mr. Martucio some substance that you had taken from a basement?

A After June, 1973?

Q Yes. Your testimony was that you began working for Pennwalt in June of 1973.

A Correct.

Q You then testified that it was while you were working at Pennwalt that you sold the substance to Mr. Martucio?

A Correct.

Q So, therefore, you sold the substance to Mr. Martucio sometime after June 1st, 1973?

A Correct.

Q When did that sale take place?

A As I recall, it was in February.

Q Of 1974?

A Correct.

Q When did the search of your house occur?

A April 1st, '74.

Q After the sale to Martucio?

A Yes.

Q How much did you sell to Martucio?

Duane E. Baldwin for Government, Cross.

A I don't know the exact weight. It was a small jar. It could have been six ounces. I don't know. I don't know the size of the jar.

Q Did you sell all that you had taken from the basement to Martucio?

A Yes, the whole jar.

Q And it was contained in the jar when you took it from Pennwalt?

A Yes, it was.

Q Prior to taking the substance in February, how many occasions were there prior to that that you had taken substances from Pennwalt's premises?

A Prior to when?

Q The jar that you sold to Martucio?

A Nothing. I never had taken nothing before then.

Q But you took something in February and you sold it to him shortly after you took it?

A Yes.

Q And then your house was searched in April?

A April 1st.

Q By the police?

A By Lt. Berrardi.

Q Who is he?

Duane E. Baldwin for Government, Cross.

A He works for the Monroe County Sheriff.

Q And Martucio was the man to whom you returned to set up this transaction to sell the substance that you delivered to Agent Martin?

A Correct.

Q And it did not occur to you at any time that Martucio may have had a tie-in with the police?

A No.

Q Did you not regard the fact that your house was searched for drugs after you had a sale with Martucio as indicating in some sense that he might have told the police?

A I did not suspect him, no.

Q How many times had you dealt with Martucio about the sale of drugs prior to the time involved in the transaction in this indictment?

A Just the one time.

Q So this was the second transaction with him?

A Correct.

Q When did you first meet Agent Martin?

A The day the sale was to take place.

Q Never before?

A Never before.

Q When you originally contacted Martucio about the sale of

Duane E. Baldwin for Government, Cross.

the substance that you and Mr. Henry had taken, when was that?

A Could you repeat that, please?

Q When did you first communicate with Martucio about the sale of the substance that you and Mr. Henry had taken?

A About a week in advance of the sale.

Q And not before?

A No.

Q So you had sold Martucio drugs, or substances represented as drugs, in February?

A Yes.

Q Your house had been searched the 1st of April?

A Yes.

Q You had been fired the same day?

A Yes.

Q Had you been arrested?

A No.

Q And then seven or eight weeks went by, and you got in touch with Martucio again?

A He got in touch with me.

Q He got in touch with you?

A Yes.

Q How?

Duane E. Baldwin for Government, Cross.

A He came over to my house, as I recall.

Q What did he say to you?

A He wanted to know when we could get some more drugs.

Q And what did you say to him?

A I told him there might be some available.

Q Were you thinking about what you and Mr. Henry had taken?

A Yes, I was.

Q Did Mr. Martucio ask for a sample?

A Yes, he did.

Q And you did make arrangements to get him the sample, did you not?

A Correct.

Q Where were those arrangements made?

A As I remember, I received a sample from Mr. Henry.

Q That would make sense, wouldn't it, because he was the one that had custody of the substance, isn't that true?

A Correct.

Q When did you get the sample from Mr. Henry?

A I don't exactly remember.

Q Where did you get it?

A As I remember, he brought it over to my residence at 121 Avenue E.

Q "He"? Mr. Henry?

Duane E. Baldwin for Government, Cross.

A Yes.

Q When did you give it Mr. Martucio?

A The next day.

Q After you received it from Mr. Henry?

A Correct.

Q How long before May 30, 1974, did the delivery of the sample occur?

A Approximately four days.

Q And in what was the sample contained?

A As I remember, it was a small plastic Baggie, sandwich Baggie.

Q Like commercial Baggies, or something of that nature?

A Correct.

Q And it was transparent, was it not?

A Correct.

Q You could see through it?

A Yes.

Q Mr. Martucio then took the sample, and do you know where he took it?

A No, I do not.

Q And he had it for about four days?

A Correct.

Q And who communicated again with whom?

Duane E. Baldwin for Government, Cross.

A He got in touch with me again, as I recall.

Q At your home?

A Yes, as I recall.

Q What did he tell you?

A He told me that the substance was what he wanted, and he wanted to make a deal on the substance.

Q And at that time did he mention himself as a buyer?

A From what I gathered, he had somebody else that he was going to sell it to.

Q What did he say that led you to gather or believe that?

A Because he said he would bring the guy over with him when the deal was going to be made, and he would bring the buyer over with him.

Q Did you object?

A No, I did not.

Q Did he give you the name of the guy he was going to bring?

A No.

Q Did he tell you where they would come?

A Yes. He said that they would come to my house at 121 Avenue E.

Q What did you say to him?

A I said that we would meet there, then.

Q Did you tell them that the drugs were at your premises?

Duane E. Baldwin for Government, Cross.

A No, I did not.

Q In fact, you told them that the drugs were not there, did you not?

A Correct.

Q That's right, because you had been searched once?

A Yes.

Q And you were at least aware that you should not keep them on your own premises, isn't that correct?

A Correct.

Q So in any event, you agreed to take them to a place where the drugs would be? That is true, isn't it?

A Correct.

Q Did you tell them how much money you wanted?

A I think we set the price at \$5,500.

Q Did you tell them how much of the substance there was?

A As I recall, I told them twenty pounds.

Q How did you arrive at the figure twenty pounds?

A That is what Mr. Henry told us he had in the amount we had taken.

Q Mr. Henry told you that when?

A I don't exactly remember.

Q Well, certainly it wasn't prior to the theft, was it?

A No, it wasn't before the theft -- it was afterwards.

Duane E. Baldwin for Government, Cross.

Q So it was sometime between the theft and the sale?

A Correct.

Q On direct examination you testified there were only two conversations with Henry, isn't that true?

A True.

Q And in neither of those conversations did you mention that Henry told you about the weight, even though the Judge and Mr. Welch asked you repeatedly what Henry said?

THE COURT: Now he has testified to more meetings.

MR. REGAN: I hope you will accept this on the credibility of this witness, Your Honor. That is the object of this cross examination.

Q In any event, it is your testimony now that in one of the conversations with Henry, you learned that there was approximately twenty pounds to sell, is that correct?

A Correct.

Q Did you tell that to Carmen Martucio?

A Yes.

Q And that was when you gave him the sample, wasn't it?

A Correct.

Q When Martucio called you back and said that it contained

Duane E. Baldwin for Government, Cross.

what th wanted it to contain and so forth, did he tell you what it contained?

A (No response.)

Q Did he refer to it by name?

A No, he did not.

Q Did you and he ever use a name for this substance?

A Not that I can recall, no.

Q Mr. Baldwin, he wasn't buying "a pig in a poke," was he?

A No.

Q Right. You told him it was something.

A Phentermine resin.

Q You told him it was some kind of "phentermine"?

A Right, phentermine resin.

Q Did he use that word, too?

A Yes, as I recall it.

Q In your prior sale to him, had you told him what you were selling?

A Yes, I did.

Q And what did you tell him you were selling him then?

A I told him it was phentermine resin. It was labeled on the bottle.

THE COURT: On the "jar," you mean?

A Yes, the jar was labeled.

Duane E. Baldwin for Government, Cross.

Q And that label was on the jar in the storage cellar at Pennwalt?

A Correct.

Q What labels were on the barrels in the warehouse?

A As I recall, there were no labels on the barrels.

Q But it looked somewhat, or it looked a little bit like what you had previously seen in the jar, didn't it?

A Yes, it did.

Q It was the same color, wasn't it?

A Yes.

Q Have you ever been arrested for drugs?

A No, I have not.

Q Sale or use?

A No.

Q What time of day was it that you met Martucio and Martin?

A It was just beginning to turn dusk. I think I met him about quarter after eight in my house, approximately.

Q This is at Avenue E?

A Correct.

Q How long did you stay at Avenue E?

A Maybe ten minutes at the most.

Q And who did the talking?

A Mostly Agent Martin, as I recall.

Duane E. Baldwin for Government, Cross.

Q And you had never seen him before, right?

A No, never.

Q And what did he say?

A He asked me a few things about the deal and what was the quantity and the price, and then he opened up his trunk, and he showed me a large quantity of bills.

Q In respect to the quantity, you assured him, or said to him in words or substance, that there were twenty pounds?

A Correct.

Q And in respect to price, you said in words or substance, "\$5,500"?

A Correct.

Q And in your conversation with Mr. Henry at the Durand Eastman Park, and on direct examination you testified to a figure of \$8,000, that is true, isn't it?

A True.

Q Remember, just a few minutes ago you testified to that?

A Yes.

Q So the reduction of \$2,500 came from your end of the line, did it not?

A Somewhere we all agreed that we would charge \$5,500 for it.

Q Klinkert, too?

Duane E. Baldwin for Government, Cross.

A Yes, as I recall.

Q Where did this occur?

A I don't remember, but that is the price that we had agreed upon.

Q When did it occur?

A I can't remember. It has been so long.

Q Never mind.

When you met Martin and Martucio, were you outside?

A Yes, we were.

Q Who is "we"?

A Me and Agent Martin and Carmen Martucio.

Q But they arrived together?

A Yes.

Q Before they arrived, were you standing outside?

A No, I was not.

Q You were inside?

A Yes.

Q Where was the scale?

A I had it inside the house in a brown paper bag.

Q Was there anything else in that bag?

A No.

Q When you got in the car, did you observe anything else in the car?

Duane E. Baldwin for Government, Cross.

A No, I did not.

Q Where did you sit?

A Agent Martin drove, and Carmen sat on the passenger's side in the front.

Q So you didn't see what was on the floor in front of the car, did you?

A No, I did not.

Q When Agent Martin opened up the trunk of the car, what did you see?

A A large quantity of bills.

Q Were you so dazzled as not to observe what else there may have been in the trunk of the car?

A I saw nothing else, as I recall.

Q You can't even tell me whether there was a spare tire in there, right?

A No, I cannot tell you, no.

Q Specifically, did you see the sample you had given to Mr. Martuccio?

A No, I did not.

Q Was any evidence of the sample on Agent Martin?

A No.

Q Did you ask them anything about the sample?

A No.

Duane E. Baldwin for Government, Cross.

Q And you were carrying at this time when you got into the car that scale in a brown bag?

A Correct.

Q And then the car proceeded to Webster, is that true?

A Correct.

Q Without any interruption?

A Yes. We proceeded all the way to Sunset Trail without interruptions.

Q How long did that ride take?

A Approximately twenty minutes.

Q When you got to Sunset Trail, you were blocked going down the street because of a brush fire, is that correct?

A That is correct.

Q How long did you wait there?

A Approximately fifteen to twenty minutes.

Q Now you had done what to arrange to have the drugs at Sunset Trail at this time? What had you done?

A I had called Jonathan Klinkert to have him get in touch with Wayne Henry to have the drugs arranged to be at the garage.

Q You didn't call Henry, right?

A Not that I recall.

Q And Klinkert agreed, or what did he say?

Duane E. Baldwin for Government, Cross.

A Yes. I told him what time the deal would take place, and he got in touch with Henry.

Q What time did you tell him?

A I think it was about six o'clock on the 30th.

Q So by the time you got to Sunset Trail and had waited there for the fire, you knew you were late, didn't you?

A Yes, we were late.

Q You knew you were almost several hours late, didn't you?

A Yes.

Q Did you mention that to Mr. Martin or to Mr. Martucio?

A We all knew we were late, yes.

Q When you got there and drove in the driveway, you parked your car, is that correct?

A Correct.

Q Did you observe Mr. Henry's car?

A I can't recall where it was parked, no.

Q Did you see Mr. Henry as you were driving in the driveway?

A No, I did not.

Q Did you see Mr. Klinkert as you were driving in the driveway?

A No, I did not.

Q Who did you see?

A Nobody in the driveway.

Duane E. Baldwin for Government, Cross.

Q When you got out of the car, what was the first thing you did?

A We proceeded to the garage, as I recall.

Q And when you went inside the garage, who was there?

A John Klinkert and Wayne Henry.

Q No one else?

A No one else.

Q Klinkert's son was not there?

A Not that I recall.

Q When you entered, did Martin and Martucio enter with you?

A Yes.

Q What did you see when you got inside?

A Mr. Klinkert was working on something, and Mr. Henry was just standing there and watching, as I recall.

Q Drinking a beer?

A Drinking a beer, that is correct.

Q Of all these Exhibits here in front, what bag did you see, if any?

A If I recall, it was all in the brown garbage bag. It was all contained within that.

THE COURT: Is that there?

MR. REGAN: I don't see a brown garbage bag.

Duane E. Baldwin for Government, Cross.

THE WITNESS: Tan.

Q Yellow, maybe?

THE COURT: Hold both of them up.

Q This one (indicating)?

A Yes.

Q That is what you saw, right?

A As I recall, yes.

Q Did you open it up?

A No, not that I recall.

Q Mr. Baldwin, you have got the scale which you bought from Martucio?

A Yes.

Q And you knew this was the bag that the drugs were put in, and isn't it a fact, sir, that you instructed Mr. Henry to divide these substances into "littler bags" so that you could put it on this little weighing device, because you, and only you, knew the size of this scale, isn't that true?

A Not that I recall. I thought it was all in one big bag.

Q You know that the big bag, as a matter of fact, can't be weighed on this, don't you?

A I never even used that scale before.

THE COURT: You mean you didn't

Duane E. Baldwin for Government, Cross.

know the capacity of the scale?

A No.

THE COURT: You say "no." That is what you did mean?

MR. REGAN: I object. I haven't finished my examination.

THE COURT: I'm trying to find out the meaning of the term that he used.

MR. REGAN: And I'm trying to elicit the truth from the witness.

THE COURT: What do you think I'm trying to do?

MR. REGAN: I haven't any idea, and I don't object to Your Honor's interruption.

THE COURT: Then if you don't object, what is all the conversation about?

MR. REGAN: I'm losing my train of thought, and it was an important point.

THE COURT: See if you can settle yourself, then.

MR. REGAN: I am settled.

Q You knew the size of the area for weighing on this scale?

Duane E. Baldwin for Government, Cross.

THE COURT: You mean "capacity by area," don't you?

MR. REGAN: Yes. I mean the size of this shiny, metal disc, approximately --

THE COURT: The metal disc is part of the scale.

MR. REGAN: Yes, six inches in diameter.

THE COURT: You knew the platform was about six inches. That is what he means.

THE WITNESS: Correct.

Q And it was you who brought the scale?

A Yes.

Q And it was you also that asked or directed that this substance be put in small bags for the convenience of weighing it, is that not true?

A I don't recall. I thought we were going to just weigh it on the spot, just whatever means we had.

Q Your term was that it was "scooped" into the bag from the barrel, correct?

A Correct.

Q It was loose in the bag at the time of the theft, correct?

A Yes.

Duane E. Baldwin for Government, Cross.

Q Or was it your intent to put that large bag in which you had scooped all this quantity of substance on that scale?

A I figured it would be in a couple of separate bags.

Q The last time you saw it before the transaction on the 30th of May, by your very own testimony, was when Henry removed it from the premises at Pennwal, and that is true, isn't it?

A True.

Q And you had Henry take it into his possession because you knew from the prior search of your house that it was dangerous for you to have possession of it, isn't that what you said?

A True.

Q Now you say you expected it to be in smaller bags. That is what you testified to, isn't it?

A True.

Q And I suggest to you that the truth is that you thought it was to be in smaller bags, because after you bought the scale, you directed Mr. Henry to put it in smaller bags so they could fit there on that platform, isn't that true?

A True.

Q When you arrived at the garage at Sunset Drive with that

Duane E. Baldwin for Government, Cross.

scale, who was the first one physically to open the bag, the larger bag?

A With the drugs in them, the bag with the drugs?

Q Let's call it this brown substance so we won't get involved -- this substance (indicating)?

A Yes.

Q Who was the first one to open the bag?

THE COURT: What bag?

Q Where did you say it was?

THE COURT: He has already pointed to it there. He called it "brown."

MR. REGAN: Yes.

THE COURT: It looks to me to be yellow. In any event, the bag he is holding up is the one you mean, and that is the big bag.

Q That is the big bag?

A Yes.

Q Who was the first one that opened up the big bag?

A I don't remember.

Q You were doing the weighing, according to your own statement, isn't that true?

A I was attempting to do the weighing, but I couldn't get

Duane E. Baldwin for Government, Cross.

the scale to operate. I didn't know how to do it.

THE COURT: When you were attempting to do the weighing, what were you weighing?

A We had a big bag setting on the scale.

THE COURT: That one right there (indicating), and you pointed to it, didn't you?

A Yes.

THE COURT: That is what you were trying to weigh?

A Yes.

THE COURT: That bag and its contents?

A Yes.

THE COURT: All right.

Q All at once, right?

A Yes.

Q And you never opened it, isn't that true?

A Not that I recall.

Q Not that you recall?

A No.

Q How long did it take you to determine you couldn't find

Duane E. Baldwin for Government, Cross.

out how much it weighed?

A Just a few minutes.

Q And what did you say to Henry and what did you say to Martin and Klinkert during this period of time?

A As I recall, everybody was getting overanxious or excited or something, and Henry said, "Don't worry. The weight is all there. It is all there."

He said, "I weighed it," or something.

Q Did Klinkert show you his own scale that was in the garage at the time?

A Not at the time. I don't recall him showing me the scale, but I do know that he did have a scale there.

Q You do know that Klinkert had a scale in his garage?

A Yes.

Q And was it Klinkert that said that the weight was all there?

A As I recall, it was Henry.

Q But in any event, somebody had said that they had weighed it?

A es.

Q When?

A I do not recall.

Q So you don't know whether they had weighed it on Klinkert's

Duane E. Baldwin for Government, Cross.

scale, or whether Henry may have weighed it earlier?

A Correct.

Q Have you ever heard of "methaqualone"?

A No, I have not.

Q Have you ever seen it on any labels around the Pennwalt plant?

A No, I have not.

Q Did Mr. Martin ever use that term to you?

A No, he did not.

Q Or Henry?

A No, he did not.

Q Or Klinkert?

A No.

Q Or for that matter even Martucio?

A No.

Q After it was determined that an accurate weight could not be determined, what happened next?

A I think Agent Martin made the statement saying, "I will give you \$4,500 for the entire amount."

Q And then did anybody else say anything?

A I think Wayne Henry said, "Yes, we will do it."

Q What did you say?

A I said nothing.

Duane E. Baldwin for Government, Cross.

Q Did you nod your head?

A Not that I recall, no.

Q Then what happened after that?

A As I recall, Wayne Henry picked up the bag, and they were going out to Agent Martin's car to get the money, and they were going to put the drugs in Agent Martin's trunk.

Q What made you think they were going out to the car to get the money?

A That is --

Q -- where you had seen the money?

A Correct.

Q Who was carrying the bag?

A As I recall, Wayne Henry.

Q Then what happened?

A After a few seconds, me and John Klinkert were still in the garage, and I heard some scuffling going on outside, and I proceeded to the door, and as I arrived at the door, an agent arrested me.

Q So you never saw what happened outside, correct?

A Correct.

Q Did you hear anybody say anything after they had gone outside?

A No, I did not.

Duane E. Baldwin for Government, Cross.

Q Well, there has been no testimony at all by you about Carmen all this time. What did Carmen do all this time?

A He just stood by and said nothing at all.

Q From the time he arrived at the garage until the time that Agent Martin went out to the car, he said nothing?

A He said nothing that I can recall, no.

Q Did you have him in your view at all times?

A Yes.

Q And where was he most of the time?

A I think most of the time he was near Agent Martin.

Q In the garage?

A I don't recall where he was standing in the garage exactly.

Q But he was in the garage?

A Yes.

Q Did he go outside as well with Martin?

A I don't remember.

Q He could have?

A He could have, yes. He could have.

MR. REGAN: Just a minute, Your

Honor.

(Pause in the proceedings.)

Q Did you ever tell Mr. Henry, or show Mr. Henry, a large box containing a powdery substance in your locker?

Duane E. Baldwin for Government, Cross.

A No, I did not.

Q And which box you said you had taken from the dead storage area of the Pennwalt Corporation?

A No, not that I can recall.

Q Was there such a place as the "dead storage area" in the Pennwalt Corporation?

A "Dead storage"?

Q Yes.

A I guess it could be called that. That is where they kept all the old equipment and things no longer in use.

MR. REGAN: Your witness.

MR. WELCH: I have nothing further.

Thank you, Your Honor.

(Witness excused.)

MR. WELCH: Your Honor, I respectfully request the Court to take judicial notice, and I move the admission of Title 21, United States Code, Section 811 and 812, which authorizes setting up schedule of controlled substances, and Title 21, CFR, Section 1308.12(e)(1), and Federal Register for Thursday, October 4, 1973, which designates methqualone as a controlled substance

Adjournment.

as Schedule II.

THE COURT: The statute is available to me, but that other document isn't, so just furnish it to me. Mark that other document as an Exhibit.

MR. WELCH: The Federal Register?

THE COURT: Yes. Mark it as an Exhibit.

(Government's Exhibit 12 marked in evidence.)

MR. WELCH: At this time, Your Honor, the United States rests.

THE COURT: You are going to put the defendant on the stand?

MR. REGAN: Yes, I am.

THE COURT: I have to go to a funeral tomorrow of a relative, and it is in Wayne County, and I don't know when I will be back. I think it would be safer to put this over until the day after tomorrow. We will adjourn until Wednesday morning at ten o'clock.

At 4:30 P.M., an adjournment was taken to Wednesday, January 21, 1976, at 10:00 A.M.)

Proceedings, dated 1-21-76.

Motions.

Rochester, New York

Wednesday, January 21, 1976

10:00 A.M.

MR. REGAN: At the close of proceedings on Monday afternoon, the Government rested its case, Your Honor. I would like to make some motions.

The first motion I will make proffers that the Government has failed to prove its case beyond a reasonable doubt, and I ask that the Indictment be dismissed.

The second motion I would like to make, and raise two questions of law under the Constitution. The Government's last request to this Court was to take judicial notice of the fact that on October 4, 1973, the Justice Department caused to be published in the Federal Register a classification of methaqualone as a Schedule II controlled substance.

I'm going to object to the sufficiency of the law in this motion. First

Motions.

of the Constitution requires that the legislative power of the United States be invested in the Congress of the United States and not the Justice Department. That appears in Article I of the Constitution.

I submit to the Court that Section 412 of Title 21, United States Code, under which various substances are classified as criminally controlled is quintessentially a legislative act, and that Congress cannot delegate the power to decide what substances shall and what substances shall not be controlled under the penal law. Accordingly, Section 12, insofar as it transfers and delegates to the Justice Department of the United States, transfers to the Executive Branch of government legislative power in violation of the provision of Article I of the Constitution. This, perhaps, may not be the case in a civil matter, but in a criminal law matter, Section 412 of Title 21, it seems to me incumbent upon the

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Congress to take the charge which the people of this country have put upon it and to make these classifications themselves. Accordingly, the delegation of the power of classification is the equivalent in this case to the power to make law. Consequently, the delegation is unconstitutional, and the classification is invalid. That is Part One of that motion.

Part Two: This procedure does not provide adequate notice of what criminal behavior is proscribed. By that I mean the classification of methaqualone as a controlled substance does not appear in Title 21, United States Code, even to this date, that is, January 21, 1976. The only place where you can presently find methaqualone as a controlled substance is in the 1975 Codification, or Code of Federal Regulations. Prior to that you could only find it in the pages of the Federal Register, Pages 27517 through 27520 for the year 1973.

I submit to the Court that not

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even a lawyer trained in legal research could find that methaqualone was a controlled substance by referring to Title 21 of the United States Code and to the Code of Federal Regulations at the time of this event, May 30th, 1974, but would have been relegated to the monolithic and monumental pages of the Federal Register and to an un-indexed search thereof. That would have required him to search the Federal Register page by page.

Accordingly, this motion asks the Court to set aside the classification as binding upon this defendant on the grounds that such a procedure constitutes inadequate notice to any defendant to be charged with the crime that methaqualone is a controlled substance. In other words, there was insufficient promulgation of this information to bind this defendant to the knowledge that methaqualone was a controlled substance because of the method of classification.

These are the two grounds for the

Wayne F. Henry, the Defendant, Direct.
motions.

THE COURT: I will decide it when
I decide the case.

MR. REGAN: Thank you, Your Honor.

The defendant would like to call
Wayne Henry.

W A Y N E F. H E N R Y, the defendant,
called as a witness in his own behalf, being first duly sworn,
testified as follows:

DIRECT EXAMINATION

BY MR. REGAN:

Q Mr. Henry, how old are you?

A Twenty-nine years old.

Q Could you give me your date of birth?

A July 23rd, 1946.

Q Where do you presently live?

A East Rochester, New York.

Q Where did you live on or about May 30th, 1974?

A 236 Alexander Street, Rochester, New York.

Q You are the defendant in this case, are you not?

A Yes, sir.

Q Now during May of 1974 and prior thereto, where were you
employed?

Wayne F. Henry, the Defendant, Direct.

A Pennwalt Pharmaceutical, Jefferson Road, Rochester, New York.

Q When did you first commence your employment at Pennwalt?

A August, '73.

Q Had you ever worked for any pharmaceutical company prior to that time?

A No, sir.

Q What were your duties in respect to your employment at Pennwalt?

A Maintenance electrician.

Q What did a maintenance electrician do around Pennwalt?

A We were to maintain anything that was electrical, including machinery, lighting. That just about covers it.

Q Did you have anything to do with the handling of narcotics?

A No, I did not.

Q Did you have anything to do with the handling of drugs?

A No, I did not.

Q Did you have anything to do with the chemical manipulation or solidifying of drugs or narcotics?

A No, I did not.

Q Did you know or meet during the course of your employment Jonathan Klinkert?

A Yes, sir.

Q And did you know or meet also during the course of your

Wayne F. Henry, the Defendant, Direct.

employment Duane Baldwin?

A Yes, sir.

Q Whom did you meet first?

A I think we were all introduced at the same time in the shop maintenance area.

Q Were they also on the maintenance crew?

A Yes, sir.

Q Did you all work the same shift?

A Yes, sir.

Q Did there come a time when you and either Klinkert or Baldwin discussed the removal of any substance from the plant premises?

A Yes, sir.

Q Could you tell me when this conversation occurred for the first time?

A I believe it was after February of 1974.

Q And could you tell me what, in words or substance, he said to you and you said to him?

A Mr. Baldwin was talking about it to both John Klinkert and myself. He said if we could get out some phentermine we could make a lot of money off of it.

Q Did Baldwin suggest to you that he had done this on a prior occasion?

Wayne F. Henry, the Defendant, Direct.

A I had known that Duane Baldwin was taking material out of Pennwalt Corporation for at least a good two or three months before the discussion.

Q When did you first learn that Baldwin had been doing this?

A We were down servicing a compressor, and he was telling me of the things that he had been taking out.

Q Did there come a time, then, later when you had another conversation with Baldwin about removing something from the premises?

A Yes, the day before it happened, or I should say, the same day that it happened.

Q The same day?

A The same day.

Q What time would this be?

A Prior to lunch.

Q But what month and day of the year, if you can remember?

A I think it was just two to three weeks prior to his being dismissed from Pennwalt on charges of removing material.

Q You mean Baldwin's dismissal?

A Right, Baldwin's dismissal.

Q And that was the same day on which you took some kind of substance, is that correct?

A Yes, sir.

Wayne F. Henry, the Defendant, Direct.

Q And where did the conversation before lunch occur?

A In Building 1, second floor.

Q Who was there?

A Myself, John Klinkert and Duane Baldwin.

Q What did you say to them and what did they say to you?

A We were talking about it. He offered John a thousand dollars and he offered myself fifteen hundred for my part in the removal.

Q In the theft?

A Right.

Q What did he say about the payment of the fifteen hundred?

A He said that once we got it out, I was to take it in my car to my home at Alexander Street, and I was to keep it there until the time that he could dispose of it.

Q Did you agree to participate in the taking of the substance?

A Yes, I did.

Q Did you agree in respect to the sale that you would help in the sale of the substance?

A No, I did not.

Q Have you ever sold or marketed, or merchandised, any substance of any kind?

A No, sir.

Q Do you know, or did Baldwin tell you, that he had done so?

Wayne F. Henry, the Defendant, Direct.

A He said that he had gotten money from the stuff that he had removed prior to this time.

Q At that time had you ever heard of Carmen Martucio?

A No, I had not.

Q Or Agent Martin?

A No.

Q When and under what circumstances did you remove the substance?

A It was removed from Building 1 off Loading Dock 1 in Storage Area 1.

Q You say Building 1?

A Building 1.

Q Loading Dock 1?

A Right.

Q And what else did you say?

A Well, Storage Area A, you could say.

Q Storage Area A?

A Yes.

Q How large is Storage Area A?

A It is approximately the size, the length of a football field, and maybe the width of a football field.

Q So it considerably larger than this room?

A Yes.

Wayne F. Henry, the Defendant, Direct.

- Q What time was it when you and the others began the process by which you would take this substance?
- A It was after work and everybody else was gone.
- Q What time of day would that make it?
- A After four thirty.
- Q Four thirty P.M.?
- A Four thirty P.M.
- Q Who did what?
- A Myself and Duane Baldwin removed the rosin from a drum in Storage Area A.
- Q Was Klinkert with you?
- A Mr. Klinkert was a look-out.
- Q In respect to the drum, what did it look like?
- A It was a sixty-five to seventy-five gallon drum, approximately four to four and a half foot high, three foot wide.
- Q What was it made of?
- A It was made up of a fibrous material.
- Q Did it have any labels on it?
- A No, sir. The only things that were on the drum itself was a code number, which Control had placed on it for their own personal use.
- Q Do you remember what that number was?
- A No, I do not, sir.

Wayne F. Henry, the Defendant, Direct.

Q Was the drum open?

A As to the fact whether it was sealed or unsealed?

Q All right. Was it locked or sealed?

A No, sir, it was not.

Q Was it closed?

A Yes, sir.

Q And was this drum circular in shape?

A Yes, sir.

Q Could you give me some idea of the diameter?

A Approximately two and a half to three feet.

Q Who opened the drum?

A Mr. Baldwin opened the drum.

Q And when you looked inside, what did you see?

A There was a white transparent plastic bag, and inside the plastic bag was a brown crystal-like substance.

Q It was a white transparent bag?

A Right, sir.

Q How large was the white transparent bag?

A The same size as the drum.

Q So it was, in effect, a liner?

A Yes, just a liner.

Q Was the bag made of plastic?

A Yes, sir.

Wayne F. Henry, the Defendant, Direct.

Q And inside the bag there was what?

A A brown crystal-like substance, which is known as resin, or rosin.

Q What did you do and what did Mr. Baldwin do?

A We had a gray plastic bag with us at the time.

MR. REGAN: Just one moment.

I guess this is not specifically numbered, is it, Mr. Welch? I would like it specifically numbered for this question.

Would you mark this for identification.

(Defendant's Exhibit 1-A marked for identification.)

Q Wayne, tell me if you see Defendant's Exhibit 1-A, and I ask you if you recognize it?

A Yes, I do.

Q Is that the gray bag?

A Yes, sir.

Q Now what did you use to remove the brown crystals from the drum and put it in the bag?

A A regular scoop, a metal scoop.

Q Something you could hold in your hand?

A Yes.

Wayne F. Henry, the Defendant, Direct.

Q And who did the scooping?

A I did, sir.

Q And how long did this take?

A Approximately five minutes at the most.

Q And what happened to the gray bag?

A That is pertaining to what?

Q After you scooped some of the substance out of the drum and put it in the bag, what happened to the gray bag?

A Mr. Baldwin immediately got down from the drums and proceeded to the shop area with the bag.

Q Not you? Right?

A No, sir.

Q Did you later come into custody of this bag?

A Yes, I did.

Q How much later?

A Approximately another five minutes had passed after I had walked around to make sure that there was nobody around watching us.

Q And who did you get it back from?

A I got it from Mr. Baldwin.

Q Where did you take it?

A Immediately to the trunk of my car.

Q And where was your car, inside the company premises?

Wayne F. Henry, the Defendant, Direct.

- A Yes, it was.
- Q Then when did you leave the premises that day?
- A Approximately a quarter to five to five o'clock.
- Q Where did you keep that gray bag after that?
- A I took it immediately home with me, put it into the closet, locked the closet and proceeded to go about a normal day's life.
- Q When you put the brown crystal substance in the gray bag, did you use any other kind of bags?
- A No, sir.
- Q Was the substance actually free in that gray plastic bag?
- A Yes.
- Q No other container?
- A No other container.
- Q How long did it remain in that condition at your house?
- A Up until the day of the arrest.
- Q Did you have any conversations with Baldwin after that time?
- A Yes, sir. I had maybe one or two.
- Q Did you ever have any conversations with Baldwin and Klinkert or both or either about what it was that you had taken?
- A Yes.

Wayne F. Henry, the Defendant, Direct.

Q When did they occur?

A On the day of the theft John Klinkert and myself told Mr. Baldwin that it was an inert substance.

Q Upon what information did you base that statement?

A On the fact that Mr. Klinkert had worked there longer than I had, and I couldn't just ask him questions throughout the period of time that I was working there. I had learned that.

Q Did you learn in the course of your employment from April of '73 through this period of March 4 where the narcotics were stored on the premises at Pennwalt?

A Yes, I did.

Q Where were they stored?

A They were stored in Building 1. They are also stored in a large vault.

Q How was the vault secured?

A The vault is secured in many different ways.

Q Have you seen this vault?

A I have seen it once.

Q It is locked, is it?

A Yes.

Q With a combination lock?

A It is a combination lock and also a padlock on it, I

Wayne F. Henry, the Defendant, Direct.

believe.

Q And a padlock?

A Yes.

Q Was the drum or barrel from which you took this substance inside that vault?

A No, sir, it was not.

Q Where was it located in the warehouse?

A In Building 1 -- within the warehouse?

Q Yes.

A Directly behind Loading Dock 1.

Q And was it located there with many other things?

A Yes, sir.

Q It wasn't particularly segregated, right?

A No, sir.

Q What did Baldwin say when you and Klinkert told him it was an inert substance?

A He said that he had seen a control lab specialist take out a sample of it and mark it as such on a piece of paper as to the fact that it was a narcotic.

Q What did he say? What were his words?

A He said that he watched the man write down on a slip of paper that it was phentermine.

Q Phentermine?

Wayne F. Henry, the Defendant, Direct.

A Yes.

Q That was his words, right?

A Yes.

Q What did Klinkert say?

A He said, "It could not be," and I agreed with him.

Q You agreed with whom?

A Mr. Klinkert.

Q But did Baldwin say that he was going to continue to sell it anyway?

A Yes, he did. He did not say "sale." He just said "market."

Q "Market"?

A Yes.

Q Did he tell you how he was going to market this?

A No, he did not.

Q How long after the conversation in which you discussed the quality of the substance was it that you had your next conversation with Baldwin?

A Approximately two to three weeks prior to our arrest.

Q Was this the conversation in Durand Eastman Park?

A Yes, sir, it was.

Q And what did you say to him, and he to you?

A I was just driving through Durand Eastman. I was on vaca-

Wayne F. Henry, the Defendant, Direct.

tion at the time, and I noticed his car in a parking space, and I got out to see if I could find him, and he came up to me, and he said to me, "How are you doing?" It was just normal conversation, and all of a sudden he said to me that the stuff that we had removed from Pennwalt, that he had a buyer for it.

Q Was this meeting prearranged?

A No, sir, it was not.

Q It was circumstantial, is that right?

A Right.

Q "Coincidental," I mean?

A Right.

Q How long did this conversation take?

A About ten minutes.

Q After he told you that he had a buyer, did he tell you what to do?

A He said he would like a sample.

Q Did you make arrangements to get a sample to him?

A Yes, I did.

Q How did you do that?

A We agreed that within a week or so that we would see each other again, and at that time I would give him a sample.

Q Where did you agree to meet?

Wayne F. Henry, the Defendant, Direct.

A At Mr. Klinkert's garage.

Q Did that meeting occur?

A Yes, it did.

Q This was not May 30th, was it?

A No, it was not. It was approximately one week prior.

Q Was Klinkert there?

A Yes, he was.

Q And Baldwin was there?

A Yes.

Q And you came, right?

A Yes.

Q Did you give him the gray bag at that time?

A No, I did not.

Q What did you give him?

A At home I filled a Marlboro cardboard box, filled with this resinous material, and I disbursed it to him that night.

Q Let me ask you this. In your judgment, how much did the gray bag filled with "brown crystals," as you say, how much did it weigh, in your judgment, at the time you took it from the barrel?

A Less than ten pounds.

Q How much did the sample weigh that you gave Mr. Baldwin?

Wayne F. Henry, the Defendant, Direct.

A A half pound to a pound.

Q Did Mr. Baldwin tell you at any time after you gave him this sample what he intended to do with it?

A He himself told me he was going to give it to the person or persons which he had made a deal with.

Q Did he identify them by name?

A No, he did not.

Q Did he offer to increase your participation in the proceeds of the sale?

A No, he did not.

Q Was there ever at any of these meetings, in any of these conversations with Baldwin, a change in the fixed sum that you were to get?

A No, there was not.

Q At the time you gave him the sample, you said it was approximately a week before the arrest, is that true?

A Yes, sir.

Q Did you talk with Baldwin at any time during that week?

A No, I did not.

Q You knew, though, that Baldwin had been dismissed from Pennwalt?

A Yes. He was dismissed approximately two months prior.

Q When was the next time you either heard from Baldwin or

Wayne F. Henry, the Defendant, Direct.

Klinkert?

A On the day of the arrest. I cannot remember the exact time, but during the course of the day Mr. Klinkert got a telephone call from Mr. Baldwin. He came back and relayed to me that that night I was supposed to have the stuff out at Mr. Klinkert's garage and that it was supposed to be packaged in individual bags.

Q Did he tell you where he got this information from?

A From Mr. Baldwin.

Q He told you that it had to be packaged in individual bags?

A Yes, sir.

Q Did he tell you why?

A I didn't ask why, and I didn't want to know why.

Q This was during the working day?

A Yes, sir.

Q You and Klinkert had this conversation, then, at Pennwalt?

A Yes, sir.

Q Did he mention a time that you were to bring it out to his house?

A I was supposed to be there seven or after.

Q Did you go, then, back home that afternoon?

A Directly from work?

Q Yes.

Wayne F. Henry, the Defendant, Direct.

- A I made a few stops.
- Q I mean you eventually wound up --
- A I got home approximately at five thirty that afternoon.
- Q Did you then put the substance in the gray bag in little individual bags?
- A Yes, I did. They were clear plastic bags.
- Q I'm going to show you Government's Exhibits 9, 7, 3, 2 and 5, and ask you if you see in any of those Exhibits the individual transparent bags you used to put the substance into the gray bag?
- A I can identify three of them, sir.
- Q Which three are they?
- A Government's Exhibits 9, 7 and 3.
- Q Now Government's Exhibits 2 and 5, there are white plastic bags, are there not?
- A Yes, sir, there are.
- Q Up until the time you removed the brown substance from the gray bag and put them in the sandwich bags, did you ever at any time use a white plastic bag?
- A No, sir, I did not.
- Q And the bags that you did use, you say are in Government's Exhibits 9, 7 and 3?
- A Yes, sir.

Wayne F. Henry, the Defendant, Direct.

Q In respect to the other two Government Exhibits, when was the first time, if at all, you saw a white plastic bag?

A Today.

Q After you put the brown crystal substance into individual sandwich bags, what did you then do?

A I put them back into the gray plastic bag and then proceeded out to Mr. Klinkert's.

Q What time was it that you arrived at Klinkert's house?

A Approximately six to six fifteen.

Q What did you do with the gray bag?

A It was in the trunk of my car.

Q And did you leave it there?

A No, sir. It was taken into his garage.

Q When you took it into Klinkert's garage, who was there?

A Just Mr. Klinkert and myself.

Q No one else, right?

A No one else.

Q Mr. Baldwin had not arrived?

A No, sir.

Q What did you do then?

A I proceeded to go fishing, sir.

Q Now in May, at this time of year, it is still daylight at that time of day, is it not?

Wayne F. Henry, the Defendant, Direct.

A Yes, sir.

Q As a matter of fact, it is daylight up until eight or eight thirty?

A Yes, sir.

Q How long did you fish?

A Until approximately seven o'clock, between seven and seven thirty.

Q All this time the bag was up in the garage, in Mr. Klinkert's, was it not?

A Yes, sir.

Q Was Mr. Klinkert with you at all times?

A Not at all times, sir.

Q In your judgment at the time you made the delivery of the gray bag and all the little sandwich bags inside it, approximately, in your judgment, how much did that weigh at that time?

A Approximately ten pounds.

Q When was it that you stopped fishing?

A Between seven and seven thirty.

Q When did you expect Mr. Baldwin?

A He was supposed to be there at seven o'clock.

Q How far was the fishing dock from where Mr. Klinkert's garage was?

Wayne F. Henry, the Defendant, Direct.

A Approximately a hundred feet.

Q Who was fishing with you?

A His son and myself for awhile. Then Mr. Klinkert joined us and his wife.

Q Did you keep the garage under constant watch during the time --

A You could not see the garage from the fishing dock.

Q So you do not know who may have entered or left or had been in the garage during the time you were fishing?

A No, sir, I do not.

Q Was Klinkert with you at all times?

A No, sir.

Q Approximately what time did Mr. Baldwin arrive?

A Approximately between eight thirty and nine o'clock.

Q And what happened when he arrived?

A He arrived with two other males.

Q Where were you?

A I was in the garage.

Q Where was Klinkert?

A He was in the garage with me.

Q Was there anybody else in the garage?

A No, sir.

Q What were you doing?

Wayne F. Henry, the Defendant, Direct.

A We were working on a car motor.

Q How large is this garage?

A I would say about forty by thirty, forty feet.

Q Forty feet by thirty feet?

A Yes.

Q It is a very large garage?

A Yes.

Q What part of it were you in?

A We were in the far corner of the garage.

Q Where was the gray bag?

A It was in the opposite corner away from us.

Q Diagonally?

A Diagonally, yes, I would say so.

Q Where did Mr. Baldwin and the two men enter?

A From the front side of the garage.

Q And at the time they entered, were they nearer to the bag than you were?

A They were, yes.

Q What did you do?

A We were introduced to each other.

Q Then what happened?

A Then Mr. Baldwin picked up the bag and walked out to the car, procured the scales that he had, and walked back in

Wayne F. Henry, the Defendant, Direct.

with it.

Q With the scale?

A Yes, sir.

Q Do you recognize Government's Exhibit 1 as the scale that he had?

A It looks the same, sir.

Q What happened next?

A The man I have come to know as Agent Martin, and Mr. Baldwin and Carmen proceeded to try and weigh the entire bag at once on the scale.

Q What happened?

A And they were unsuccessful, because the weight was too great for the scale.

Q They were unsuccessful, is that correct?

A Yes, sir.

Q Mr. Baldwin says it is because he didn't know how to operate it, right?

A Well, that is what he says.

Q You don't know why it was unsuccessful, do you?

A No, I do not.

Q Did you attempt to weigh it at all?

A No, I did not.

Q In respect to the weight, what was said by Mr. Baldwin

Wayne F. Henry, the Defendant, Direct.

and Agent Martin and the other man?

A If I remember right, Mr. Martin said to Mr. Baldwin, "You are a fool. You cannot weigh all that at one time. It has to be weighed individually."

Q Did Martucio say anything?

A There might have been some conversation in there.

Q Did you hear him say anything?

A I cannot remember.

Q Had you ever seen Martucio before?

A No.

Q Had you ever seen Martin before?

A No.

Q In respect to the weight problem, did they ever connect the weight problem with money?

A Not at this particular time.

Q Do you know, or did you know at this time that the weighing was going on, the amount of money that had been involved in the transaction between Baldwin and Martin?

A I did not.

Q Did you hear them say anything in respect to money and weight?

A I did not.

Q What were you and Klinkert doing?

Wayne F. Henry, the Defendant, Direct.

A We were off to the side, and Mr. Klinkert had a beer in his hand and a wrench, and I had proceeded to the refrigerator to get a beer for myself.

Q Were you helping Klinkert with his car?

A Yes, sir.

Q How long did the conversation about weight and weighing on the scale go on?

A They stood there and argued for a few moments, and then Mr. Martin proceeded to open the bag and --

Q The gray bag?

A Yes, sir.

Q What did he do?

A He proceeded to take out one of the bags that I had individually prepared for that night.

Q What did he do with that?

A They tried to weigh it on the scale again, and then they said that neither one of them could get the scale to work.

Q After they decided that they couldn't get the scale to work, what did they do?

A Then they started arguing over the fact that it couldn't be correctly weighed, and Mr. Martin was not going to pay for an un-weighed amount.

Q Did you do anything at that point?

Wayne F. Henry, the Defendant, Direct.

A At this point, no.

Q Did the argument continue unabated?

A Yes, it did, for about a few minutes longer, and then Mr. Baldwin called me over, and he said, "There is twenty pounds there, is there not?"

And dumbfoundedly, I didn't know how to get from ten to twenty, and I just said, "Yes."

Q Did you have a scale?

A No, we did not.

Q Did Martin respond to your statement "yes"?

A He said, "Yes, but the deal was for twenty-five pounds," and the fact that he was not going to pay \$5,500 for twenty pounds when he was supposed to get twenty-five pounds.

Q Did you ever hear the sum \$5,500 before?

A No, I did not.

Q What did you do next?

A Mr. Baldwin looked at me and shook his head, and I said, "Well, how much do you want to pay for it?"

And he said, "I will go \$4,000."

And Mr. Baldwin shook his head to me in response, saying, "No."

I said, "What about forty-five," and then Mr. Martin

Wayne F. Henry, the Defendant, Direct.

agreed.

Q To forty-five?

A To \$4,500.

Q Did Baldwin nod his head then?

A Yes, he did.

Q Then what did you do?

A We proceeded out to Mr. Martin's car where he opened up the trunk of his car and took out a brown paper bag, which upon opening it, I seen was a large amount of hundred dollars bills.

Q At any time up to this point had you mentioned from the time you delivered the gray bag to Klinkert's premises, either to Martin or to Carmen or to Baldwin or to Klinkert that you believed this was an inert rosin still?

A Yes, I did.

Q To whom did you mention it?

A Mr. Klinkert.

Q What did Klinkert say?

A He said, "I agree with him."

He said, "If we get caught and the people are nasty, we could end up with a lot of trouble."

Q Did you mention it at any time after Martin and Carmen arrived?

Wayne F. Henry, the Defendant, Direct.

A No, I did not.

Q Did you mention it at any time again that evening to Baldwin?

A No, I did not.

Q When you went out with Martin after the discussion about \$4,500 and you saw what Martin so poetically referred to as a "flash roll --" and do you know what that means?

A I do now, sir.

Q Did you know then?

A No, I did not.

Q Did he refer to it as a flash roll then?

A No, he did not.

Q When you saw him open the brown bag to take out hundred dollar bills, what did you have in your hand?

A Nothing.

Q Did you ever touch the bills?

A No, I did not.

Q What was Martin doing with the bills?

A We were standing by his car -- more towards mine -- and he then proceeded to count out in hundred dollar denominations up to approximately fifteen to two thousand dollars worth.

Q Where was Carmen at this time?

Wayne F. Henry, the Defendant, Direct.

A During the time that Mr. Martin was counting the money to me, he appeared out of the garage, with the bag, and put it into Mr. Martin's car and had shut the trunk lid.

Q Did you at that time see any white plastic bags?

A No, I did not, sir.

Q Did you at that time see any bag other than the gray bag?

A Yes. I seen the yellow bag in the box there.

Q Was that the first time you had seen that yellow bag?

A Yes, sir.

Q Do you know where it came from?

A No, I do not.

Q While Mr. Martin was counting the money, other persons appeared on the scene, did they not?

A Yes, they did.

Q What did they say?

A All I know is that one guy pushed me up against the car and stuck a revolver in my head.

Q What did he say to you?

A He said, "Do not move, or I will blow your brains out."

Q Then what else happened?

A He told me, Mr. Martin, and Carmen the same thing, and then Mr. Baldwin and Mr. Klinkert appeared from behind the garage, out the door, and they were apprehended the same

Wayne F. Henry, the Defendant, Cross.

way.

Q Have you made a statement about this to either Mr. Martin or to any other police officer?

A No, I have not.

Q Have you ever been convicted of a crime?

A No, I have not.

Q And has everything you have told us here in your testimony been true?

A Yes, sir, it has.

Q To your best knowledge and recollection?

A Yes, sir.

MR. REGAN: Your witness.

CROSS EXAMINATION

BY MR. WELCH:

Q Mr. Henry, when is the first time that you saw this yellow bag, which is in G-8?

A The first time I seen that particular bag was when it was brought out of Mr. Klinkert's garage and put into Mr. Martin's trunk.

Q Who brought it out of the garage?

A Carmen Martucio.

Q Prior to coming to court here, when is the last time you saw the gray bag, which is D-1A?

Wayne F. Henry, the Defendant, Cross.

- A When it was laying on the floor in Mr. Klinkert's garage prior to Mr. Martin and I going out the door.
- Q When Mr. Baldwin arrived with the other two men on May 30th and walked into the garage, what was the next thing you said you saw him do?
- A He introduced us, and then he picked up the gray bag and walked out the door, and then returned with the scales and the bag.
- Q On your direct examination, you examined numerous plastic bags, but you did not examine G-4 or G-6, is that correct?
- A Right, sir.
- Q Would you examine those two bags, G-4 and G-6, and tell us whether or not you see the plastic bags in those two bags in which you say you put the brown crystal substance on the day of the arrest?
- A G-4 has one in it. G-6 has a white paper bag in it that I have never seen before until this day.
- Q The question is, does it contain the Baggie that you say you packaged the substance in?
- A No, it does not.
- Q How many sandwich bags did you fill on May 30th?
- A Approximately ten.
- Q And did you take all ten with you to Klinkert's garage

Wayne F. Henry, the Defendant, Cross.

on the 30th?

A Yes, I did, sir.

Q On the day you stole the substance with Mr. Baldwin from Pennwalt Laboratories, did you have occasion to weigh the substance?

A No, we did not.

Q Did there ever come a time when you, yourself, had occasion to weigh that substance?

A No.

Q So when Mr. Regan asked you for your best judgment, your best judgment is nothing more than a guess, is that true?

A That is true.

Q Now the particular storage area, or warehouse, where this was stolen, it was under lock and key at the time that you stole it, though, isn't that correct?

A No, sir.

Q Anyone from the street could have walked into there?

A What do you mean?

Q Why don't you explain to us? What kind of security was there?

A The security that was there is people could walk into the dock area, but there would be somebody present in the dock area who would not recognize this person and would ques-

Wayne F. Henry, the Defendant, Cross.

tion him immediately.

THE COURT: That was so during working hours, but this was after four thirty, though?

THE WITNESS: After four thirty?

MR. WELCH: Yes.

THE WITNESS: Okay.

Q At the time you stole it?

A There is no security in the area outside of the dock doors being locked.

Q So the dock doors are locked?

A Right.

Q So that anyone could not walk in and open up the barrel that you opened up?

A Right, sir.

Q When you had this discussion with Mr. Baldwin concerning the fifteen hundred dollars that you were to get paid, could you tell me when did that take place?

A He told me on the day of the theft, that for my participation in the theft I would receive fifteen hundred dollars for the fact that I was to take it to my residence and hold it until he could disburse it.

Q So you would get your fifteen hundred dollars from the

Wayne F. Henry, the Defendant, Cross.

proceeds of the sale?

A Right, sir, but I did not know at the time where the fifteen hundred dollars was coming from.

Q You didn't know who he was going to sell it to?

A I did not know where the money was going to come from.

Q You just said it was going to come from the proceeds of the sale?

A No, I did not.

Q Did you have any idea where it was going to come from?

A No. I didn't know whether he was going to take it out of his pocket or pick it out of the air.

Q So you thought he was going to pick fifteen hundred dollars out of the air to help you steal an unguarded substance?

A Right.

Q That is what you are telling the Court you would like him to believe?

A Let's put it this way. In my mind I knew where he was going to get it from, but he did not tell me where he was going to get it from.

Q In your mind at the time you stole it, where did you think he was going to get the fifteen hundred dollars from?

Wayne F. Henry, the Defendant, Cross.

A I believed he was going to sell the stuff.

Q Now you were an electrician maintenance man, and you worked on machines and things, isn't that right?

A Yes.

Q For electrical problems?

A Yes.

Q Isn't it true that you worked on those machines that processed drugs?

A No, I did not.

Q You were never in an area where machines processed drugs?

A I was in the area, yes.

Q Were you ever in an area where there were drugs in the course of your duties?

A Yes. Every maintenance man out there has.

Q When did Mr. Baldwin tell you that his house had been searched by police officers?

A I believe that was three weeks later -- well, all I know he was dismissed from Pennwalt Corporation.

Q Let me help you, just so we get the facts straight. We had testimony that he was dismissed April 1st, 1974.

A All right.

Q Was it prior to that time he told you that his house had been searched?

Wayne F. Henry, the Defendant, Cross.

- A No. Afterwards, the next day, in the cafeteria and from our security officer I learned it.
- Q You learned what?
- A That his house had been searched and that he had been dismissed.
- Q What did he tell you as to why you were storing this material?
- A I have no idea. He just said I was to keep it at my place.
- Q Did he ever tell you that his house was searched?
- A On our meeting in Durand Eastman Park, yes.
- Q Did he ever discuss it at any other time?
- A No, he did not.
- Q How long have you known Jonathan Klinkert?
- A From my day of employment until this day.
- Q How well did you know Jonathan Klinkert?
- A We got to be pretty close friends.
- Q You think highly of Jonathan Klinkert?
- A I didn't think highly of him. We were just very good friends. We trusted one another.
- Q You knew him well enough to fish with his son?
- A Yes.
- Q You were at his house frequently?

Wayne F. Henry, the Defendant, Cross.

A Yes.

Q You knew his wife?

A Yes.

Q And prior to when he had to testify here against you the other day, you would have called him your friend, isn't that true?

A That is true, and I still will.

Q And when Mr. Baldwin introduced you to Mr. Martin and this Carmen fellow, what name did you use?

A My own.

Q What name did Mr. Klinkert use?

A His own.

Q And the substance that you stored at your house, what did you say you did with it at your house?

A I took the plastic bag out of the trunk of my car and put it into my closet at home.

Q And did you secure it in any way?

A Just in a footlocker and locked the locker, and I had the key with me. That is all.

Q So it was in a locked locker?

A Right.

Q Was the locker within something, a closet or something?

A Yes. It was in the closet.

Wayne F. Henry, the Defendant, Cross.

Q And was the closet locked?

A No.

Q How many times have you stolen things from Pennwalt?

A That was the first and last time.

Q How many times have you participated in the sale of some substance that had been stolen from Pennwalt?

A Never.

Q Do you know a Kenneth Tolhurst, or Ken Tolhurst?

A No, I do not.

MR. REGAN: Will you spell that name?

MR. WELCH: T-o-l-h-u-r-s-t.

Would you mark this for identification?

(Government's Exhibit 13 marked for identification.)

Q I'm going to hand you G-13 for identification and ask you to look at that, please.

A I do not recognize it.

Q Did you ever hear Mr. Baldwin mention Mr. Tolhurst?

A No, I haven't.

Q And in your conversations with Mr. Baldwin, did he ever tell you how many times he had sold things that he had

Wayne F. Henry, the Defendant, Cross.

taken from Pennwalt?

A No, he never mentioned that. All I know is that he said to me on some occasion that he had received money for materials that he had taken out.

Q Did he tell you what materials he had taken out?

A No, he did not.

Q You didn't really make any effort to find out exactly what the substance was that you had stolen with Mr. Baldwin, did you?

A I know what it was.

Q My question was, did you make any effort to find out what it was after you stole it?

A Afterwards?

Q Yes.

A No, I did not, because I didn't believe I had to.

Q The source of your knowledge as to what this substance is stems from Mr. Klinkert's opinion and your opinion from the way it was kept, is that correct?

A Yes, sir, and plus other people.

Q What other people?

A People that I had worked with and asked questions of.

Q Prior to stealing it?

A Yes.

Wayne F. Henry, the Defendant, Redirect.

Q Did you ask them questions about this particular drum?

A Not this particular drum, no.

Q You asked questions on what kind of things were stored in this warehouse?

A Right.

MR. WELCH: I have no further questions.

Thank you, Your Honor.

REDIRECT EXAMINATION

BY MR. REGAN:

Q Wayne, did you ever read the name "tuisol" or some such word on any of the drums or on the specific drum from which you removed this brown crystal substance?

A No, I did not.

Q Did Baldwin ever say to you, in words or substance, that he had removed materials from the dead storage area, or dead storage cellar?

A Yes.

Q And did he name that as being one of the places he had taken materials from?

A Yes, sir, he did.

Q Could you tell me what the dead storage area was?

A To my knowledge the dead storage area is a place where

Wayne F. Henry, the Defendant, Redirect.

they store non-used equipment and machinery.

Q Did you ever stop believing at any time, from the time you took it to the time of your arrest, that this substance was an inert brown rosin?

A No, I did not.

MR. REGAN: May I have Government's Exhibit 13?

(Government's Exhibit 13 handed to Mr. Regan.)

MR. REGAN: For the record, I would like to describe Government's Exhibit 13 as a photograph of a stout, bearded and mustached male, and obviously taken by the Sheriff of Monroe County, No. 66782, showing the front and the profile of the male.

Take a good look at that photograph and tell me, if you rack your brain and --

THE COURT: You don't have to "rack your brain." Just look at that.

(Government's Exhibit 13 handed to the witness.)

Wayne F. Henry, the Defendant, Redirect.

Q Now I ask you, have you seen that guy before?

A The man does not look familiar to me whatsoever.

Q Can you imagine him without the beard and the mustache?

A It doesn't help.

MR. REGAN: Your witness.

MR. WELCH: I have no further questions.

(Witness excused.)

* * *

THE COURT: Is there some more testimony?

MR. REGAN: No, Your Honor, there is no more.

MR. WELCH: I have a note, Your Honor, that I may have a witness in rebuttal, and I would like to talk to whoever sent me this note, and I can advise you momentarily. I have not had a chance to talk to this person.

THE COURT: If you have, it will be ready after recess?

MR. WELCH: I assume so. I haven't had a chance to talk to the person

Discussion.

who sent me the note.

THE COURT: If you have got any testimony, I would like to take it now.

I will take a recess, and find out what you can during the recess.

MR. WELCH: Yes, Your Honor. Thank you.

(Recess from 12:00 P.M. to 12:20 P.M.)

MR. WELCH: Your Honor, the Government has no rebuttal.

THE COURT: All right. The evidence is closed.

The only thing I need is a terse summary, proposed findings from each side. I don't require a brief, but you can file one if you want to.

The Government shall have two weeks from today to submit its proposed findings, and the defendant will have a week after that to submit its proposed findings. That will be final submission, three weeks from today.

Trial Concluded.
Court Reporter's Certification.

(The trial in the above-entitled
cause was concluded at 12:20 P.M.,
Wednesday, January 21, 1976.)

REPORTER'S CERTIFICATE

I, A. Jake Jacobson, Official Court Reporter for
the United States District Court for the Western District
of New York, appointed pursuant to the provisions of
Title 28, United States Code, Section 753, do hereby
certify that the foregoing is a true and correct trans-
cript of proceedings had and testimony taken in the
within-entitled and numbered cause on the date herein-
before set forth; I do further certify that the foregoing
transcript has been prepared under my direction.


A. Jake Jacobson

Dated: June 4, 1976

Proceedings, dated 1-19-76 and 1-20-76.

UNITED STATES OF AMERICA
IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NEW YORK

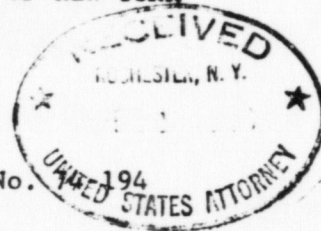
UNITED STATES OF AMERICA,)

- vs-)

WAYNE F. HENRY,)

Defendant.)
-----)

Cr. No.



Transcript of testimony of MICHAEL TSOUGROS and DR.
WILLIAM F. HEAD, taken in the above-entitled matter, before
the HON. HAROLD P. BURKE, United States District Judge, in
the United States District Court, at Rochester, New York,
on Monday, January 19, 1976; and Tuesday, January 20, 1976.

APPEARANCES:

RICHARD J. ARCARA, ESQ.
United States Attorney
(By Eugene Welch, Esq.)
Assistant United States Attorney
United States Courthouse
Rochester, New York 14614

Appearing on behalf of the Government.

JOHN M. REGAN, ESQ.
711 Wilder Building
Rochester, New York 14614

Appearing on behalf of the Defendant.

Proceedings, dated 1-19-76.
Michael Tsougros for Government, Direct.

Rochester, New York

Monday, January 19, 1976

M I C H A E L T S O U G R O S ,

called as a witness by the Government, being first duly sworn,
testified as follows:

DIRECT EXAMINATION

BY MR. WELCH:

Q Mr. Tsougros, would you tell the Court how you are employed?

A I am employed as a forensic chemist for the United States Department of Justice, Drug Enforcement Agency.

Q How long have you been so employed as a forensic chemist?

A Approximately four and a half years.

Q Has that four and a half years been spent with the Justice Department Laboratory?

A Yes, sir.

Q Where did you say you are employed?

A I am employed in the New York Regional Laboratory.

Q When you say "Regional Laboratory," what area does that Laboratory cover?

A That covers Massachusetts -- basically, the New England area.

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Q Would it cover Rochester, New York?

A Yes. It covers all of New York.

Q Tell the Court, if you would, please, what your duties are as a forensic chemist for the Northeast Regional Laboratory?

A I analyze drug evidence, and I testify in court as to my findings.

Q Have you had any formal education in this area?

A Yes, I have.

Q What is that?

A I have a Bachelor of Science degree in chemistry from Wagner College; a Master's Degree in organic chemistry from Fordham University; I had six months on-the-job training with the New York State Regional Laboratory.

Q In addition to your four and a half years' experience with the Northeast Regional Laboratory, are there any other areas which you had experience in this forensic chemistry field?

A No, sir.

Q I would like to direct your attention to the Exhibits in front of you which are G-2 through G-7, and G-9, and ask you, have you seen those before?

A Yes, sir, I have.

Q Where did you see those before?

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Michael Tsougros for Government, Direct.

- A I saw these in the Northeast Regional Laboratory in New York.
- Q Were those Exhibits received from the Rochester Office of the DEA Task Force?
- A I believe so. I don't know for certain. I received them from the Evidence Technician in the New York Regional Laboratory.
- Q Did you conduct any tests on the substance contained in those Exhibits?
- A Yes, I did.
- Q Could you tell the Court what tests you conducted?
- A Well, I subjected the contents of all these bags, all seven bags, to screening tests, which are simple chemical tests, to give an idea of what substances are present, and then on each bag I subjected the contents of each bag to thin layer chromatography, infrared spectrophotometry, and ultraviolet spectrophotometry.

MR. REGAN: Before he gets into the result of these tests, I would like to object at this point that there is a missing link in this chain that he said he received it from a different source than to which Migliorati testified he mailed --

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THE COURT: Objection is overruled.

Q As a result of these several different tests, were you able to reach a conclusion concerning what the substance was in those bags?

A Yes, I did.

Q Could you tell the Court what that conclusion was?

A I found that three of the bags contained methaqualone.

Q Would you identify which three bags contained methaqualone?

A Government's Exhibit 5, Government's Exhibit 2 and Government's Exhibit 6. Only these three bags contained methaqualone.

Q Only three of the bags contained methaqualone?

A Yes, sir.

Q Was there any controlled substance in the remaining bags?

A No, sir.

Q But you conducted the same series of tests on all seven bags?

A Yes, sir.

Q During the course of your testing and after your testing, did you have occasion to prepare a report concerning the results of that testing?

A Yes, I did.

Q I am handing you G-10 for identification and ask you to

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Michael Tsougros for Government, Voir Dire.

take a look at that. Does that bear your signature?

A Yes, it does. And this is the report that I submitted subsequent to the analysis of the evidence.

Q Is it in the ordinary course of business for you to prepare these kind of reports?

A Yes, sir.

Q And was this particular report prepared in the ordinary course of your business?

A Yes, sir.

MR. WELCH: I offer it into evidence,

Your Honor.

MR. REGAN: May I have a preliminary question?

THE COURT: Yes.

VOIR DIRE EXAMINATION

BY MR. REGAN:

Q What is the name of the person from whom you received these bags?

A The name of the person?

Q Yes.

A James Winslow. I believe it is on the report.

MR. REGAN: I have no objection,

Your Honor.

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THE COURT: Who is James Winslow?

A He is the Evidence Technician in the New York Regional Laboratory.

(Government's Exhibit 10 marked in evidence.)

MR. WELCH: Would you mark this for identification?

(Government's Exhibit 11 marked for identification.)

MR. WELCH: Your Honor, I offer in evidence G-11, which purports to be a return receipt, Postal Service, Form No. 52717, signed by James Winslow.

MR. REGAN: I have no objection.

THE COURT: It is received.

(Government's Exhibit 11 marked in evidence.)

DIRECT EXAMINATION CONTINUED

BY MR. WELCH:

Q Now, Mr. Tsougros, the was found, according to your conclusion, methaqualone in three of the bags and no controlled substance in the other four bags?

A Yes, sir.

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Q Which of the bags contained the largest amount of the substance?

A (No response.)

Q Was there more methaqualone or more non-controlled substance?

A Are you referring to by weight?

Q Yes.

A Well, I believe that you can see that these are much larger, from my report it states from the weights of the bags.

Q Without refreshing your recollection from the report, can you recall the weights of these items?

A No, sir.

Q Would you read for a moment G-10, please, to yourself?

A (Witness complies.)

Q What are the respective weights of the methaqualone and the non-controlled substance?

A The total weight --

THE COURT: If you will just give us the weight of the methaqualone, we will know what wasn't controlled.

Q What is the weight of the methaqualone?

A The total of these three bags is 7,213.6 grams.

THE COURT: How many pounds does

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that make?

A A thousand grams is 2.2 pounds.

THE COURT: Just give me the result,
not how you arrived at it.

A A little more than fifteen pounds, roughly.

THE COURT: Fifteen pounds?

A Right, roughly.

Q In the course of your experience at the Northeast Regional
Laboratory, Mr. Tsougros, have you had an occasion to
examine a controlled substance known as phentermine?

A Yes, sir.

Q What, if any, is the difference in the physical or the
visual appearance of methaqualone and phentermine?

A What do you mean by the "physical appearance"? Do you
mean the actual drug --

THE COURT: How would you describe
it?

A They are both white powders, but by chemical analysis you
can determine --

THE COURT: They look the same?

A Physically, they look the same.

MR. WELCH: I have no further
questions. Thank you, Your Honor.

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CROSS EXAMINATION

BY MR. REGAN:

Q They are both white powders, aren't they, sir?

A Yes, sir.

Q They are not dark brown?

A In pure form they are white powders.

Q Would you discuss again for me the tests, the various tests, you used to determine the presence of this substance?

A Thin layer chromatography.

Q Thin layer chromatography?

A Right.

Q What is that?

A It is a chromatographic method for separating the various components in a compound, and it can give you information towards identifying those components.

Q It is a method of qualitative analysis, is it?

A Yes, sir.

Q That is what it is, isn't it?

A Right.

Q Now is litmus paper used?

A No, sir.

Q What is used for the chromatographic test?

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THE COURT: That is a color test?

A No, sir.

THE COURT: Isn't it color?

A No, it is not. It involves the use of various selected solvent systems and applying, and glass plates, which have a coating of silicogel on them, and to these glass plates you apply a solution of the compound you are testing.

Q In other words you take that brown substance in front of you and you put it into a solution?

A Right.

Q Now what is in the solution?

A Well, in this case it was very difficult because of the nature of the material to work with it directly, so it was necessary to use chemical means to extract, to purify the compound in order to do it.

Q In other words, you had to isolate what you were looking for, is that correct?

A Yes, sir.

Q Who told you what you were looking for?

A No one.

Q Then how did you know what ingredients to use to isolate?

A Well, there are various standard techniques used that are just basic to chemistry itself.

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Q In any event, though, you put some of that substance in solution?

A Yes, sir.

Q Did you take some substance from each of the bags in front of you?

A Yes, sir.

Q Were they essentially in that condition when you received them?

A The condition I am looking at them now?

Q Yes.

A You mean the contents?

Q No. I mean with the bags that way.

A Most of them were.

Q Which ones were not?

A Well, this one was not (indicating).

THE COURT: Which one is "this one"?

A This is Government's Exhibit G-2.

Q Now each of the bags which methaqualone was found, in front of you there is a white opaque plastic bag?

A Yes, sir.

Q And in each of the bags in front of you in which methaqualone was not found, there is a smaller transparent plastic bag, is that true?

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A Yes, sir.

Q Can you remember whether you took from the methaqualone bags, Exhibits G-5, G-2 and G-6, substances from the white plastic bags?

A Substances from the white plastic bags?

Q Yes, or were those bags, in fact, broken and had they spilled their contents into the larger bags at the time you received them?

A No. When I received these three bags, the brown resinous material was contained in the white plastic bags, and they were contained in heat-sealed evidence envelopes.

Q So when you reached into the bags that contained the methaqualone, you severed, or slit, the evidence bag, the outer bag, isn't that true?

A Yes, sir.

Q And then you extracted from the inner white plastic bag a sample of the substance?

A Yes, sir.

Q Now the substance contained a lot more than methaqualone, didn't it?

A Well, I only identified methaqualone, but obviously, there were other substances present, yes.

Q And you called those substances just a moment ago a brown

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rosinous substance?

A Resinous material.

Q R-e-s-i-n?

A Yes. By this I meant I was just describing the nature of these pellets, which are contained in the bags.

Q Physically, is there any difference between what you found in the white plastic bags and between what you found in the transparent plastic bags, that is, from the physical appearance, color, feel, taste?

A I don't taste them, but by appearance, they all appeared to be brown resinous material.

Q How about the granular quality? Is there a finer granular quality?

A Not that I could detect.

Q When you say a "brown resinous material --"

A -- resinous.

Q "Resinous"?

A Yes, sir.

Q All right. Can you tell me what it is?

A What exactly the material is?

Q Yes.

A No, sir.

Q You didn't test for that, correct?

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A When I say "brown resinous material," I am referring to the overall appearance of the material that is in here. What I did was just identify one component in the make-up of the pellets of the resinous material.

Q Is it your judgment as a chemist that every sample of the material which you would extract from G-5, G-2 and G-6 would contain some methaqualone?

A Well, I'm not sure what you mean. Do you mean each individual bead, each individual pellet?

Q Now you take a sample, don't you?

A Yes.

Q How much?

A It varies with the amount of sample I have, and with how much controlled substance, how much drug I find in it.

Q How much did you take from Exhibits 5, 2 and 6?

A I don't remember exactly.

THE COURT: Approximately how much

did you take for analysis?

A A gram or two grams, maybe more.

Q What I asked you is, that in your judgment as a chemist, assuming that you took two grams of that material from any of the bags labeled G-5, G-2 and G-6, is it your judgment as a chemist that in any of those samples even taken at

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random, you would find the presence of methaqualone?

A Yes.

Q All right. And is it your judgment as a chemist that if you take a sample of G-3, G-4, G-7 and G-9 of equivalent quantity, that is, a gram or two -- and am I correct on those Exhibit numbers?

A G-7, G-4, G-3 and G-9, yes, sir.

Q -- that you would not find methaqualone?

A You could analyze the entire amount in each bag, and you wouldn't find any methaqualone.

Q As you previously testified, that was the condition in respect to the quantity distribution that you found at the original time?

A Certainly.

Q Can you tell me how, as a chemist, methaqualone is inserted and dispersed into the rosin-based material so that it loses its characteristic as a white powder?

A I don't know the exact technique they use, but basically, what it involves is they have an inert resinous substance and they take a solution, which is just a liquid which dissolves the drug methaqualone, and they soak it into the resinous material. That is basically the way it is done. They can also do it by chemical reactions by

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bonding the substance chemically to the resin, but I don't know specifically in this case how it was done.

Q Now after it is done, are there not labeling requirements in respect to the insertion of methaqualone in the rosin substance?

A I believe so, yes. I don't know.

Q Did you find any such labels on any of these bags?

A No, sir.

Q Did you find any label at all on any of these bags?

A Stating the contents?

Q Yes.

A No, sir.

Q What other tests did you impose other than thin layer chromatography?

A I performed infrared spectrophotometry.

Q In other words you took an infrared picture, is that correct?

A An infrared spectrum, yes, of each of the bags.

Q Could you describe briefly what that test consists of?

A That involves isolating the substance, in this case methaqualone in its pure form, chemically, and after you do that, you make it into a solid solution using an inorganic substance, which is called potassium bromide.

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You form a transparent pellet out of this by compressing it under high pressure, and you take this pellet and you place it into an instrument which subjects light in the infrared spectrum, and it varies the spectrum. It varies the wavelength of the light going through it, and as the light that is going through it varies in wavelength, it is also varying in energy, and each bond in the molecule of methaqualone will have a characteristic response to the energy that is being put in it, and this response is measured in the form of a spectrum.

Q And this is solely identifiable with methaqualone?

A No, sir. This can be used on any substance, and it is a positive means of identifying any substance. If you have it in the pure form, you can identify any substance simply by using infrared spectrophotometry.

Q So, basically, you had to get pure form of methaqualone in order to conduct this test, correct?

A Yes, sir.

Q You have on this report a total net of 72.14 grams, and what does that represent?

A That represents the amount of pure methaqualone contained in these three bags.

Q So of the 72.14 grams, which those bags contain, roughly

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7,140 grams are inert rosins?

A Yes, sir.

Q And the rest of it is pure methaqualone, right?

A Yes, sir. The 7,000 grams is not necessarily just inert rosins, but it is material which is not controlled.

Q What else did you find besides the rosin and the methaqualone?

A Like I didn't chemically find the rosin. I'm talking about physical appearance. My chemical tests simply involved the identification of controlled substances. I would like to, as a chemist, identify the different components of anything I get, but due to the job that I have, I can only identify controlled substances.

Q So what you are saying is, "72.14 grams of the pure controlled substance"?

A Yes.

Q The rest of the weight was non-controlled substances, whatever they were?

A Right, yes.

Q Did you do anything else besides thin layer chromatography or infrared spectrum tests?

A Yes, to determine the amount of methaqualone present, quantitatively, I used ultraviolet spectrophotometry.

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Q And when you say in Item 26 on your report "Strength: 1," does that mean pure form?

A "Strength: 1," and then under the word "Measure" is "Per cent," and that means that one per cent of the 7,213.6 grams of material in the three plastic bags was pure methaqualone.

Q Under Item 25 you had "Hydrochloride salt"?

A Yes, sir.

Q Was that another substance that you had to identify before you could identify the methaqualone?

A No, sir.

Q But there was no hydrochloride salt in the other four bags?

A Hydrochloride salt simply is a form of methaqualone or any drug that can appear in various forms, in various salt forms. And like methaqualone can appear as the "free base" as it is called, or methaqualone hydrochloride or methaqualone sulphate, whatever. In this case in order to quantitate it, I used the per cent in the form of methaqualone hydrochloride, which is the most common form in which it is found in resinous material.

Q Did you understand at the time you performed these tests that all of this material was seized at the same time and

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Michael Tsougros for Government, Cross.

at the same place?

A I assumed that to be the case because it came in as one exhibit, but I mean I don't know for a fact how it was obtained. I don't have any idea.

Q Can you exercise any judgment as a chemist as to what was the reason 1700 grams of this substance had no methaqualone?

A No, sir. It was very surprising.

Q Highly unusual?

A Yes, sir.

MR. REGAN: Your witness.

MR. WELCH: I have no further
questions of this witness.

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Proceedings, dated 1-20-76.
Dr. William F. Head for Defendant, Direct.

D R. W I L L I A M F. H E A D,

called as a witness by the Defendant, being first duly sworn,
testified as follows:

DIRECT EXAMINATION

BY MR. REGAN:

Q Would you give me your address, Dr. Head?

A I live at No. 5 Fletcher Road in Pittsford, New York.

Q Are you employed, sir?

A Yes, I am.

Q Could you tell me where you are employed?

A I am employed by the Pharmaceutical Division of Pennwalt Corporation.

Q Could you tell me whether you were so employed in 1974?

A Yes, I was.

Q And what are the duties of your employment?

A At the present time I am Executive Vice President of the Division, with duties ranging from manufacturing, quality control, engineering, data processing.

Q Is it part of your duties to maintain the custody and management of records in respect to controlled substances?

A Yes, it is.

Q And was that part of your duties in 1974?

A Yes, it was.

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Dr. William F. Head for Defendant, Direct.

Q Could you give me some idea what educational qualifications you have for this employment?

A I have a Bachelor of Science Degree in Pharmacy, a Master of Science Degree in Pharmacy, a Doctorate in Pharmaceutical Chemistry, and I also have a law degree by correspondence.

Q Can you tell me, then, based upon your qualifications whether Pennwalt engaged in the production and manufacture of a drug called methaqualone in 1974 or prior thereto?

A We did manufacture methaqualone dosage forms prior to 1974.

Q Prior to 1974?

A Yes, sir.

Q What do you mean when you say dosage forms?

A We do not synthesize chemical methaqualone.

Q What does "synthesize" mean?

A This means to prepare from other organic chemicals a new substance, from other substances, other organic substances. This means preparing the methaqualone itself from perhaps unrelated chemicals as in a chemical synthetic operation. We do not do that.

Q And you did not do it?

A No, we did not do it.

Q So when you purchased or procured methaqualone, you procured it already in a pure state?

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Dr. William F. Head for Defendant, Direct.

A That's correct.

Q Now in the pure state, as a chemist, it is what, approximately ninety per cent? What per cent pure?

A Around ninety-eight per cent pure or better.

Q And, of course, the color at the time it comes into your plant is white, isn't it?

A That's correct.

Q A white powder, is that correct?

A That is correct.

Q Did there come a time when ~~Barwalt~~ ceased using methaqualone?

A Yes, there did.

Q Could you tell me when that was?

A We ceased using methaqualone on February 28, 1973.

Q This comes from the records of the corporation, is that true?

A That's correct.

Q Have you brought some of those with you?

A No, sir, I brought no actual records with me, just dates of particular chronologies.

Q Abstracted from the records?

A Abstracted from the records.

Q And that date, February 28, 1973, is one of them, right?

A That's correct.

Q You said you synthesized methaqualone into a capsule, was

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Dr. William F. Head for Defendant, Direct.

that your testimony?

A After we received the methaqualone, the pure methaqualone, we first prepare a resin complex from it.

Q How did you do this?

A Well, we did this by mixing methaqualone in a solution of hydrochloric acid and then adding blank resin to that mixture in a large five hundred gallon tank. This is allowed to react for a period of several hours and then it is isolated and dried, and then subsequently, that dried methaqualone resin complex is then formulated with other ingredients and filled in capsules.

Q So, basically, what you are saying is that you take the pure white methaqualone substance and you combine it with other ingredients as a base or more palatable form, is that correct?

A That is basically correct.

Q Is one of the ingredients with which you combined the methaqualone inert brown rosin?

A Yes. It is an inert resin. It is powdery to the degree that it contains small, very tiny spherical pellets.

Q Take a look at Government's Exhibit G-4, G-7, G-9 and G-3, these four bags here (indicating), and in order to answer this question, if you have to open the bag, tell me, and I

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want to know if by looking through that transparent plastic bag, you can tell me whether that brown substance looks like the substance which you combined methaqualone with during the course of your production of it?

A Yes, sir. They all look the same.

Q Take a look at the same type of thing in Government's Exhibits G-6, G-5 and G-2 and see if that looks like the substance that you used?

A Yes, they also look the same.

Q Would it be possible after this blending occurred through the use of hydrochloric acid and the soaking and drying process, would it be possible to the naked eye to determine whether that brown inert rosin had methaqualone inserted in it or not?

A No, I do not think it would.

Q The naked eye could not tell, right?

A No, sir.

Q It would require chemical examination?

A It would.

Q Could you tell us in respect to the fact of production and quality control whether you were familiar with the stages of how Pennwalt produced its methaqualone capsules, the stages of production?

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A Yes, I am familiar with that.

Q You did not synthesize the methaqualone, so it was procured in a pure state from an outside source, correct?

A That's right.

Q And it was delivered, then, at the Pennwalt premises in a white powdery state, correct?

A That's right.

Q Where would it be delivered?

A It would be delivered at our east dock in Building No. 1.

Q And then where would that be taken once the delivery occurred?

A After the material is received off of the truck, the material is physically transferred into the dock premises themselves and then the material - -

MR. WELCH: Excuse me, but could you keep your voice up. I'm having difficulty hearing you.

THE WITNESS: After the material is received, the material is taken off the truck into the dock area proper and then is transferred into our raw material weighing area. And at this point the methaqualone is weighed in, sampled by Quality Control for analysis, and the material is

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then moved to a secure area for storage.

Q When you say "secure area," could you describe it?

A The secure area has varied with methaqualone in history. At one time prior to approximately the fall of 1972, we stored the methaqualone after its weighing and sampling in the raw material warehouse area, and this is a locked area. It is not a secure area in the sense of alarms and detection devices. After approximately the fall of 1972, we moved the methaqualone storage area to our security area, which is an area which is not only locked but is "alarmed and tape-wired," and so forth.

Q And is it guarded?

A During normal business hours, yes, these areas are under supervision.

Q And after normal business hours, what happens in the secured area?

A In the security area, after normal business hours, the alarm systems are turned on. These are ADT protected areas, and the areas are locked, and the alarms are turned on. There may be multiple alarm devices in these areas.

Q Up until the time it came in, it was tested for quality and it was stored in this secured area after 1972, was it still in its state as a white powder?

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A Yes, it was.

Q Then what were the next stages of production of the capsule?

A Our first process is to convert the methaqualone to methaqualone resin complex in rather sizable quantities.

Q How would you do that?

A This would be done by weighing out an appropriate amount of methaqualone base and an appropriate amount of Amber Light IR-120 resin, and then these substances are weighed out. The methaqualone substance is weighed out in the security area. The Amber Light is weighed out in the raw material weighing area, and these materials are then transported to the blending area on the second floor. And all of this is under supervision. The ingredients are then combined.

Q How much proportion is the methaqualone to the rosin in your production schedule? Can you tell me by weight?

A It would be approximately one-fifth -- one-fifth methaqualone, four-fifths resin. The final specifications of the methaqualone resin, it is approximately twenty per cent methaqualone.

Q When you take it up to the blending area, the methaqualone would be liquefied with acid, hydrochloric acid, is that correct?

A It would be dissolved in a solution of hydrochloric acid.

Q So you would have then hydrochloric acid plus the methaqualone

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in a liquid state, correct?

A That's correct.

Q Then that would be poured and inserted over and into the rosin, is that correct?

A The resin is actually added then to the solution.

Q All right, added to it. Then it is allowed to steep or to soak, correct?

A That's correct.

Q And dry?

A Actually, after the soaking period, we drained the material. We drained the solution off it because the methaqualone is now combined with the resin. We drain the solution off, wash it several times with fresh water and then eventually take the semi-dry powder out of the kettle and then perform a dry process on that powder.

Q Then the ultimate product is inserted into a capsule, correct?

A Yes, after combination with other ingredients.

Q Now did you market methaqualone or use methaqualone under the name "methaqualone"?

A Not as a single entity product.

Q What did you call it?

A Our finished final dosage form for this product was called

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Biphenamine-T.

Q Did you ever use the name Tuazole?

A Yes, we did.

Q What kind of name was that?

A Tuazole was a Wallace & Tiernan, Inc., and then subsequently a Pennwalt Corporation trademark name for methaqualone.

Q Tell me about the rosin? What happened to the rosin when it was delivered?

A The blank resins after they are unloaded from the truck are held in the general quarantine area, which is just inside the loading dock area.

Q And would you tell us how large that area might be, how large that room might be?

A Approximately the size of this courtroom (indicating).

Q And how would it be kept? What kinds of containers?

A Amber Light resins are received in fiberboard drums.

Q And in rather large quantities, is that correct?

A That is correct. I would estimate the weight of a single drum perhaps one hundred fifty, two hundred pounds, maybe.

Q Is there a place on the premises at Pennwalt known as the "dead storage area," or the "dead storage cellar"?

A Yes, there is.

Q Could you tell me where that is?

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- A That is in the rear basement.
- Q Could you tell me whether any chemicals or any type of narcotics or amphetamines or drugs or any kind would ever be placed in that area by anyone?
- A Yes, there would have been.
- Q What would be the circumstances?
- A The miscellaneous chemicals and substances, which were placed in the caged area within that basement were research compounds of various and sundry types, which were no longer useful in the laboratory.
- Q In other words, the lab would do research on certain, say, narcotics, drugs, or whatever it was, for purposes of Quality Control or Production Control, and after it was finished with that, it would put them down in the dead storage area, is that correct?
- A That is basically correct.
- Q How long have you worked for Pennwalt?
- A I have been with Pennwalt slightly over twelve years.
- Q And today is the first time you have ever met me, isn't it?
- A Yes, it is.

MR. REGAN: Your witness.

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CROSS EXAMINATION

BY MR. WELCH:

Q Doctor, this dead storage area where you said perhaps research compounds and things like that might be stored there, is that ever cleaned out?

A Occasionally, it is. Being a dead storage area, it is rather full of used equipment or old equipment, obsoleted equipment and assorted chemical compounds within the cage itself. Now usually substances of that kind and that type might actually stay in that caged area for perhaps a period of months or years, even before someone might clean that area out.

Q Who cleans that area out?

A Generally, no one had the assigned responsibility to do that at that time. Now since we do know of reports of thefts occurring from that area, we have done that at the present time, and that entire area has been cleaned out with respect to controlled drugs.

Q How is that accomplished?

A Well, when we remove any controlled drug, we have to remove it to a other security area and then hold it for destruction under DEA supervision.

Q At some point it would have to be loaded upon a truck, isn't

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that correct?

A Not necessarily. These quantities are usually fairly small because they are laboratory quantities, generally. This has nothing to do with our production inventories, and the agent who might supervise destruction might come to the conclusion that he could pour this controlled substance into a container of nitric acid and destroy the material, or he might mix it with lime and deem this suitably destroyed. This is entirely up to the DEA.

Q When did this general clean-out take place?

A The general clean-out occurred approximately the middle of the year 1974, as I recall it.

Q Do you know a Dwayne Baldwin?

A I might recognize him, and I am familiar with the name. I do not know him.

Q You are familiar with the facts of his being fired for theft?

A I am.

Q In relation to his being fired, when did the general clean-out take place?

A Not until perhaps a month or so later, because at that time we did not know where he might have obtained the material. And it wasn't until a month or so later that we were informed by one of the police agencies, and I don't remember which one,

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that there had been reports that they had taken materials from a dead storage area. Since we only have one dead storage area, we went immediately to that area to see if we could locate anything.

Q After methaqualone had been combined with inert resin to be added to the capsules, what would it look like in relation to any of those Exhibits in front of you?

A It could look like any one of them.

Q To the naked eye, it would look no different?

A That's right.

THE COURT: It wouldn't then be pellets, would it?

A Yes, sir, it still would be pellets.

Q You take these pellets and then capsulize them, isn't that correct, for dosages?

A After we mix them with other ingredients, such as lactose to make a proper capsule, yes, sir.

Q But in the contents of the capsules would be those little brown pellets to the naked eye, at any rate?

A Yes, you could see them.

Q And was the research going on involving methaqualone during 1973 or '74?

A Yes, I suspect there was.

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Q And would it be conducted on methaqualone in the state in which you see it in the three bags on your right, G-2, G-5 and G-6?

A It is highly likely that it could be, yes.

Q Now directing your attention back to this dead storage area, was there any electrical equipment in that dead storage area?

A I believe there probably is because there are air compressors-- there are some compressing equipment down in there in part of the general building, utilities equipment --

Q Do you remember any major breakdowns of any of that equipment during the early part of 1974?

A Not specifically, but we have had some problems with that equipment on occasion.

Q Do you know the defendant here on trial, Wayne Henry?

A Not personally, no, sir.

Q Have you ever seen this man sitting next to Mr. Regan?

A I do not recall him, no, sir.

Q Now this methaqualone did not become a controlled substance until October of 1973. Was it always secured prior to October of 1973 when it was not a controlled substance?

A Yes, sir, to a degree. We tried to secure under at least lock and key all internally active, therapeutically active prescription drugs.

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Q Now, Doctor, when you say "under lock and key," or when I refer to "security," would you please differentiate the difference between the security that would keep non-employees from having access to these materials and the security that might, if any, keep employees from access to those materials?

A There is a big difference between the two types of areas.

Q Would you explain to the Court what that was prior to methaqualone becoming a controlled substance and then afterwards?

A We'll, prior to its becoming -- in October of 1973?

Q Yes. We have had testimony, and that has been established.

A It was stored in part, even prior to that date, in our full security area, and this is an area that is fully alarmed and protected and wired so that in after hours if anyone came into the area, the alarm would be set off and transmitted to ADT. There were occasions prior to the fall of 1972 where we stored methaqualone in the raw material warehouse, which is simply a lock and key warehouse with no special security precautions.

Q Where employees could have access, then?

A Yes.

Q And isn't it true that some quantities of methaqualone in the state in which you see it in Exhibit G-2, G-5 and G-6,

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could have also been in the dead storage locker?

A That is possible.

Q And there are no sound alarms in the dead storage locker, are there?

A That is true.

Q Was there any time when methaqualone in the state which you see it in G-2, G-5 and G-6, the little brown pellets, was there any time within that state it would have been in the raw materials area?

A Yes. We did at one time store methaqualone resin complex, presumably looking exactly like this (indicating), in the raw materials warehouse area.

Q Does that have a building number or name?

A Building No. 1.

Q And are there any other designations of this particular area where methaqualone in that state would have been stored?

A No, sir.

Q Is there a loading dock nearby, or an area number or letter?

A Not that I am familiar with. There is a loading dock that is beyond a wall, and just on the other side of the wall of this raw material warehouse is a quarantine area and then the loading dock.

Q And would the methaqualone been on that loading dock at any

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time in that state?

A No, sir.

Q In the area where this methaqualone was kept in the raw materials area, approximately how many of these drums, these fiberboard material drums, were there at any one time?

A It could have been at any one time upwards of fifteen or twenty of them.

Q Of just methaqualone itself?

A Methaqualone resin.

Q And when you say "methaqualone resin," do you mean the brown pellets-type substance that you see in front of you there?

A Yes, that's right.

Q Did you, yourself, supervise the move of the methaqualone from the raw materials storage area into a more secure area?

A No, I did not.

Q Based upon your qualifications, your education, your experience at Pennwalt, could you tell the Court, is there any place in Pennwalt where an employee would have access to methaqualone in the state in which you see it on the three Exhibits on the right, the brown pellet form?

A Only perhaps in this raw material warehouse area, and, of course, the dead storage area that we have already discussed. The other places of possible access would be below the mixing

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tanks when the semi-dry pellets are removed from the tank.
And the other location would be in a room across the hall
from those tanks where the pellets are dried.

Q And is there electrical equipment located near the mixing
tank?

A No, there is not.

Q And how about where the pellets are dried?

A No.

Q What dries the pellets?

A Hot air, basically.

Q And what creates the hot air?

A I believe these are electrically-heated hot air drafts.

Q So there is electrical equipment located near the drying
area?

A Oh, as far as general electrical, yes, and also in the mixing
area. I thought you were referring to security equipment.

Q No. I'm talking about just any kind of electrical equipment.

A Yes, there is.

Q Now when something happens to that, or it needs to be oiled
or maintained, the electrical equipment, is it removed from
the area where the controlled substances are, or does the
maintenance worker come and fix it on the scene?

A Most generally the maintenance worker comes in and fixes it

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on the scene.

(Pause in the proceedings.)

Q I don't know if I interrupted you. Did you finish your answer about where an employee could find that kind of material in that state besides the raw materials warehouse, underneath the mixer and in the drying area, any other areas?

A In the blending area, but this area is one and the same as the drying area, too. And also perhaps possibly in the capsule filling area itself, which is the security area.

Q And is there electrical equipment in that area?

A Yes, there is.

Q And even though it is a secure area, would an electrical maintenance worker be allowed access in there to fix electrical equipment?

A Yes, he would.

Q Who repairs the electrical alarm system?

A This is under the control and supervision of the ADT Company, and they send out their own repairman for this.

Q So that a Pennwalt employee would not work on the alarm system?

A To my knowledge, no.

Q Would a Pennwalt employee have knowledge when the alarm system breaks down?

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- A Well, we have different types of alarm systems. We have our own internal alarms, which are wired to our security boards, and then we also have ADT alarm systems, which are wired to the central office.
- Q Let's assume that for some reason there is a malfunction in the ADT system. Does your electrical maintenance engineer contact ADT or your security force?
- A No. This is our security people who do this.
- Q So an electrical maintenance worker would not know necessarily when the alarms are broken down?
- A That's correct.

MR. WELCH: Thank you, Doctor.

I have no further questions.

REDIRECT EXAMINATION

BY MR. REGAN:

- Q Doctor, according to your testimony on direct examination, the brown substance when it was stored in the raw materials area after 1972 would not be as yet blended, would it?
- A That is true.
- Q So by the process of manufacture, the rosin that was stored there and looked like those bags in front of you, by the process of manufacture you described, that would still be inert as far as methaqualone was concerned, wouldn't it?

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In other words, a chemical test would not produce any methaqualone content, would it?

A If this brown substance were in the raw materials storage area, then it would have contained methaqualone.

Q Then it would have been after the blending, wouldn't it?

A After the reaction in the kettle but prior to the blending with other ingredients to put in the capsule.

Q In other words after the process in the kettle, the methaqualone was returned to the storage area, the raw materials storage area?

A That's correct.

Q And how long did that process go on?

THE COURT: What we are concerned with in this case is that material, that brown substance which you have seen in the Exhibits there. Is that an inert substance? In other words, is that absent this methaqualone?

A This particular material?

THE COURT: Yes.

A I can't tell by looking at it.

Q First of all, the inert rosin, there was a time when it was delivered in an absolutely inert state, isn't that true?

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A That's correct.

Q It had nothing in it?

A That's correct.

THE COURT: How can you tell that
unless you chemically analyze it?

A We do chemically analyze it.

THE COURT: Material such as
shown in those Exhibits?

A These Exhibits (indicating)?

THE COURT: Yes.

A Yes, sir.

THE COURT: If you have analyzed
it, then you know its chemical analysis?

A Yes. We receive the resin, the blank resin, and that is
analyzed.

THE COURT: Never mind that now.
You say you have analyzed it?

MR. REGAN: No. The witness said
they received --

THE COURT: I know what the wit-
ness said.

MR. REGAN: That is what I'm in-
terested in. The witness says they re-

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ceived --

THE COURT: I know what the witness said, but I have asked him a question.

THE WITNESS: Yes. Would you rephrase your question, because I don't understand it.

THE COURT: Is that material, such as exhibited in those Exhibits right in front of you on the desk, is that an inert substance?

THE WITNESS: Judge, I can't tell about this specific material without analysis.

THE COURT: You said you had examined it. You said you had chemically analyzed it, though.

THE WITNESS: In our routine operations in our plant, we chemically analyze the blank resin when it comes in.

THE COURT: That is the blank resin as it comes in, isn't it?

THE WITNESS: I don't know, sir.

THE COURT: All right.

Q You don't know because it looks the same before as afterward

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to the naked eye, isn't that true?

A That's correct.

Q Now there is a time that what you call the blank resin comes in?

A Yes.

Q And as a matter of quality control, that also is subjected to chemical analysis, isn't that true?

A That's correct.

Q And the chemical analysis is understood to record the fact that there is nothing in it, isn't that true?

A That's correct.

THE COURT: You talk about this substance as contained in those big drums containing, you said, probably one hundred and fifty pounds?

A Yes, sir.

THE COURT: Is that the raw inert substance?

A Yes, sir.

THE COURT: Is it your testimony that that raw inert substance does not contain methaqualone?

A That's correct.

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THE COURT: And that the methaqualone is delivered as a white powder separately, isn't that true?

A That's correct.

THE COURT: That is the "pure"?

Q All right, the pure methaqualone.

Then it is taken -- first, of all, the methaqualone in its pure state is subjected to chemical analysis, is that right?

A That's correct.

Q And it is supposed to register ninety-eight per cent pure, correct?

A Yes, sir.

Q Then the rosin comes in at one hundred and fifty pound drums, and that is subjected to chemical analysis, is that true?

A Yes.

Q That is supposed to register "blank," correct?

A That's right.

Q With no impurities, correct?

A Not absolutely no impurities. Blank for --

Q -- blank for your purposes?

A Yes.

Q Sufficiently free of impurity to be quality for blending,

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correct.

- A Yes.
- Q Then at a later stage at the production process, a blending occurs, and as you say, the methaqualone, white powder, is put into a hydrochloric acid solution?
- A That's right.
- Q And then the brown substance, "resin," as you call it, is poured into the solution?
- A Right.
- Q The solution is in liquid form, correct?
- A Not after adding the resin. The resin is --
- Q I'm talking about prior to adding the resin?
- A That's correct.
- Q The solution is in liquid form?
- A That is correct.
- Q And the resin is in powder form, correct?
- A That's right.
- Q And that blending is done away from the loading and raw materials storage area, isn't it?
- A That's correct, it is.
- Q After the blending occurs and you get a brown powder that looks exactly like the resin but you know it contains --

THE COURT: The resin doesn't

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look like a powder.

Q Does the resin look like a powder?

A It appears to be powdered with --

THE COURT: You've got it right
in front of you there? Is that resin?

A That is resin.

THE COURT: Didn't you say that
looks like pellets?

A Like tiny pellets.

THE COURT: That isn't powder,
is it?

A Well, it could be considered a coarse powder.

THE COURT: All right.

Q Now after the blending occurs, to the naked eye, the human
eye, the result is a coarse brown powder, is it not?

A It is.

Q You can't see any white powder, can you?

A No.

Q And you said you drained off the rest of the hydrochloric
acid solution, correct?

A That's right.

Q And you permitted the entire substance to dry under hot air,
correct?

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- A Correct.
- Q Now where is that stored after the blending process has been completed?
- A That material was stored prior to the fall of 1972 in the raw material warehouse.
- Q And after the fall of 1972?
- A It was stored in our security area.
- Q With the alarms and so forth?
- A That's right.
- Q So it is a fact, isn't it, that it is only prior to 1972 that an employee could have access to the methaqualone complex in the raw materials storage area, 1972 or prior thereto?
- A That would be correct.
- Q Because from 1972 forward, the methaqualone complex, or the rosin that contained the drug, was stored in the security area, isn't that true?
- A From the fall of 1972 to forward?
- Q To forward?
- A Yes, that's correct.

MR. REGAN: Thank you, Doctor.

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RECROSS EXAMINATION

BY MR. WELCH:

Q Doctor, if you would just direct your attention to G-2, G-6 and G-5, methaqualone in the state in which you see it there, that is a coarse powder, or a little tiny brown pellet, however you want to describe it.

A (Witness complies.)

Q Just tell me whether or not this is so: In addition to the raw materials area, prior to 1972, also in the area where it is processed and dried and also in the dead storage locker, an electrical maintenance employee would have access to methaqualone in that state, is that not true?

THE COURT: We are not much concerned with what was the condition before 1972. This happened in 1974.

Q In 1974, electrical maintenance workers would have access to methaqualone in that state as in G-2, G-5 and G-6 in what areas?

A Only in the dead storage area, totally, just the dead storage area.

Q They would not have access to it in the drying area?

A No, because in January, 1974, we destroyed under DEA supervision, all of the methaqualone base, to free pure material

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and all of the methaqualone resin complex that we had in the house. All of our production inventories were destroyed totally under DEA supervision.

- Q When you say "under DEA supervision," what does that mean?
- A That means an agent of the Drug Enforcement Administration, and usually from the Buffalo District Office, comes to our plant and personally attends to and supervises the destruction of that material.
- Q But he does not inventory everything you had in methaqualone prior to watching it being destroyed?
- A Yes, he does, and signs an inventory statement for it, and we have to weigh this material for him, and so forth.
- Q In order to properly do that, isn't it so that he would have to chemically analyze every brown resin substance in your plant?
- A Yes, that would be true.
- Q That would be true?
- A Yes, it would.
- Q So he takes your word for what methaqualone you have on hand?
- A Yes, he does.
- Q And you are a busy plant, are you not?
- A That's correct.
- Q And, of course, you want to satisfy this DEA supervisor, be-

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cause you have Federal licenses at stake, isn't that true?

A Exactly right.

Q But it is possible that some methaqualone was overlooked in the dead storage area or was not moved properly back in 1972 from the raw materials warehouse?

A It certainly is possible with regard to the dead storage area. It is unlikely that we missed a drum or more from the raw material warehouse.

Q But isn't it also unlikely that you would admit that in view of the Federal licenses at stake?

MR. REGAN: Well, that is a nice way to call him a liar. I object to that question.

THE COURT: I will sustain the objection.

MR. WELCH: Then I have nothing further.

Thank you, Your Honor.

MR. REGAN: Thank you, Doctor.

(Witness excused.)

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Court Reporter's Certification.

REPORTER'S CERTIFICATE

I, A. Jake Jacobson, Official Court Reporter for the United States District Court for the Western District of New York, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing is a true and correct transcript of an extract of proceedings had in the within-entitled and numbered cause on the date hereinbefore set forth; I do further certify that the foregoing transcript has been prepared under my direction.


A. Jake Jacobson

Dated: February 5, 1976

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES

- VS -

CR: 74-194

WAYNE F. HENRY

Eugene Welch
Assistant United States Attorney
for the government

John M. Regan
711 Wilder Building
Rochester, N.Y. 14614
Attorney for defendant

Trial before the undersigned without a jury
January 19 and January 21, 1976.

FINDINGS OF FACT

1. On the evidence produced at the trial I find that it has been established beyond a reasonable doubt that the defendant Wayne F. Henry, with criminal intent, did conspire and agree together with Duane E. Baldwin and Jonathan G. Klinkert, co-defendants, to distribute and dispense quantities of a controlled substance as set forth in the Controlled Substances Act and that on May 30, 1974 the defendant Wayne F. Henry did knowingly and with criminal intent dispense and distribute about 7367 grams gross weight of a substance containing methaqualone, a Schedule II controlled substance and that on May 30, 1974 the defendant

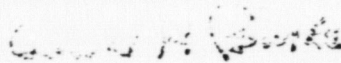
FINDINGS OF FACT AND CONCLUSIONS OF LAW.

Wayne F. Henry did knowingly and with criminal intent possess with intent to distribute and dispense about 7367 grams gross weight of a substance containing methaqualone, a Scheduled II controlled substance.

CONCLUSION OF LAW

1. The defendant Wayne F. Henry is guilty as charged in the indictment filed June 27, 1974.

I hereby fix the time and place of sentence as follows: 10:00 A.M. on May 10, 1976 at the United States Court House, Rochester, New York.


HAROLD P. BURKE
United States District Judge

April 21, 1976.

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Schedule II controlled substance; effective 10-4-73..... 27516

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Title 21—Food and Drugs
CHAPTER II—DRUG ENFORCEMENT ADMINISTRATION, DEPARTMENT OF JUSTICE
PART 1301—REGULATION OF MANUFACTURERS, DISTRIBUTORS, AND DISPENSERS OF CONTROLLED SUBSTANCES

Methaqualone and Its Salts

A notice dated April 6, 1973, and published in the Federal Register on April 11, 1973 (38 FR 9170), as amended on April 17, 1973, and published on April 23, 1973 (38 FR 10010), proposed placement of methaqualone and its salts in Schedule II of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (Public Law 91-513). All interested persons were given thirty days after publication to submit their objections, comments, or requests for hearing.

On May 14, 1973, Corning and Burlington, Counsel for William H. Rorer, Inc. (Rorer), a principal manufacturer and distributor of methaqualone under the trade name Quaalude, requested a hearing concerning the proposed placement of the drug methaqualone in Schedule II.

Subsequent to Rorer's request for a hearing, prehearing conferences were held on June 18 and June 29, 1973. The evidentiary hearings were held on July 17 and 18 and August 1 and 2, 1973. The record was closed on the last day of hearings and proposed findings and replies were filed by the parties on August 31 and September 14, 1973.

As a result of those hearings, Administrative Law Judge Theodor P. von Brand, submitted the following Recommended Decision which has been reviewed and adopted without modification by the Acting Administrator, Drug Enforcement Administration.

Before the United States Department of Justice, Drug Enforcement Administration, in the matter of scheduling of Methaqualone and its salts (Docket No. 73-11).

Recommended Decision

Theodor P. von Brand, Administrative Law Judge; Robert J. Rosenthal, Esq., Harold D. Murry, Jr., Esq., and Richard Osa Lebowitz, Esq., Counsel for the Drug Enforcement Administration; Corning and Burlington, Washington, D.C., by Eugene J. Lambert, Esq., and Christopher M. Little, Esq.; Thomas E. Quay, Esq., Port Washington, Pennsylvania, Counsel for William H. Rorer, Inc.

Preliminary Statement

This is a rulemaking proceeding pursuant to the provisions of the Controlled Substances Act, Public Law 91-513 (1970), 21 U.S.C. Section 801 et seq. By notice dated April 6, 1973, as amended on April 17, 1973, the Director of the three Bureau of Narcotics and Dangerous Drugs (BNDD) found that methaqualone and its salts:

1. Have a high potential for abuse;
2. Have a currently accepted medical use in treatment in the United States; and
3. May, when abused, lead to severe physical and psychological dependence.

On the basis of those findings, the Director proposed an amendment of 21 CFR 1306.12, by listing the drug methaqualone in Schedule II pursuant to the provisions of the Act.

On May 14, 1973, William H. Rorer, Inc. (Rorer) requested a hearing concerning the proposed amendment of the list of drugs contained in Schedule II of the Bureau's regulations (ALJ Exhibit 4). In its comments on the Bureau's proposal, Rorer contended essentially that the Bureau had failed to

meet one of the statutory prerequisites to the listing of the drug under Schedule II because of a failure to show that abuse of the drug "may lead to severe psychological or physical dependence" (ALJ Exhibit 7).

Subsequent to Rorer's request for a hearing, prehearing conferences were held on June 18 and June 29, 1973. The evidentiary hearings were held on July 17 and 18 and August 1 and 2, 1973. The record was closed on the last day of hearings and proposed findings and replies were filed by the parties on August 31 and September 14, 1973.

Rorer does not contest the Drug Enforcement Administration's findings that methaqualone and its salts:

1. Have a high potential for abuse; and
2. Have a currently accepted medical use in treatment in the United States.

The sole issue to be decided is whether the abuse of methaqualone "may lead to severe psychological or physical dependence."

This matter is now before the undersigned for final consideration of DEA's notice of proposed rulemaking, Rorer's comments and requests for hearing, the evidence, the proposed findings of fact, conclusions and briefs filed by counsel for the Government and for Rorer. Consideration has been given to the proposed findings of fact, conclusions and briefs filed by the parties and all proposed findings of fact and conclusions not herein specifically found or concluded are rejected; the undersigned, having considered the entire record herein, makes the following recommended findings of fact and conclusions drawn therefrom:

Recommended Findings of Fact

1. Methaqualone is a depressant drug of the sedative hypnotic group (Port 64).
2. A drug is any biologically active substance that alters the physiology or chemistry of the body whether used in the treatment of illness or used for non-medical social purposes (Port 53).
3. The psychoactive or mind-altering category of drugs comprises those drugs whose primary effect is on the mind or consciousness of the individual (Port 53).
4. The central nervous system depressants are drugs that relieve anxiety (sedatives) or induce sleep (hypnotics) (Rorer Exhibit 2, p. 10).
5. The depressant drugs are one of the major subtypes of the psychoactive or mind-altering drugs. They decrease or dampen the electrical and chemical activity of the brain beginning with the frontal areas and then with progressive dosages, spread to involve the lower centers of the brain on to and including control of respiration and heart action (Port 53-54).

The depressant drugs are comprised of the sedative hypnotic group which includes the barbiturates, methaqualone, and a variety of other drugs. The narcotics such as heroin, morphine, codeine, and methadone are also included among the depressant drugs (Port 64).

5. The sedative hypnotic drugs which work on the central nervous system, tend to produce drowsiness, diminish alertness and decrease inhibitions. They impair muscular coordination and to some extent vision, as well as judgment, reasoning, and memory. These results vary with the dosage consumed (Port 54-55).

The short-term effect of a large dose of a depressant drug or of a sedative hypnotic drug may progress into stupor and coma. If the dose is sufficient in a concentrated time period, it may lead to death with the terminal stages of the individual's conscious state sometimes involving convulsions or

chronic movements of the body and a variety of other symptoms (Port 55).

6. The standard drug in the sedative hypnotic class are the barbiturates (Port 64).

In the strict sense, methaqualone is a non-barbiturate hypnotic (Brown 210). Nevertheless, there is a substantial element of resemblance between methaqualone and the barbiturate hypnotics in terms of the chemical and pharmacological properties of this drug (Brown 210). As far as methaqualone's pharmacology and biochemistry is concerned, it is almost indistinguishable from the short-acting barbiturates (Brown 218, 227).

The accepted medical use for the barbiturate drugs is to relieve tension, anxiety, stress or to induce sleep. Another common use is as an adjunct in the treatment of certain forms of epilepsy and as a preanesthetic medication (Port 67).

Methaqualone, like the barbiturates, is medically prescribed for sedation or for the induction of sleep. It is also used nonmedically for the same reasons as other sedative hypnotics, viz., a user would use it in terms of feeling good, feeling high, getting high, escaping, or relaxing (Port 64-65).

Methaqualone would be closest to the short-acting barbiturates such as pentobarbital and secobarbital. By short-acting, it is meant that the drug has a quick onset of action somewhere between two and six hours (Port 67).

7. The therapeutic dose of methaqualone for sedation would be 75 to 150 milligrams. There is an increasing practice of using the larger tablet, namely, 150 milligrams although 75 milligrams was previously indicated as satisfactory. A therapeutic dose for hypnosis, namely, sleep induction, would be 300 milligrams. The drug is also manufactured in tablets of 600 milligrams and 800 milligrams (Port 68).

8. Use of a drug means that the person has consumed it. Abuse of a drug means that part of drug use where heavy use measurably impairs health, and/or social or vocational function. For example, drug abuse may impair the body organs such as the liver, impair faculties while driving, or lead to interpersonal conflict associated with heavy use of the drug (Port 69-70).

9. Physical dependence means addiction and includes the elements of tolerance and withdrawal illness or abstinence syndrome (Port 70, 11, 74).

10. Tolerance is an adaptive process by the body's cells or the body as a whole to an alien compound such as a drug. It is measurable by pharmacological or biochemical tests (Brown 237).

The practical consequence of tolerance is that an individual must take increasing amounts of a particular substance to obtain the same effect (Matthew 253).

Tolerance is a part of the withdrawal syndrome since it is highly probable that an individual who has become tolerant to a drug will exhibit the "withdrawal or abstinence syndrome when the drug is stopped" (Matthew 253-54, Port 74). In the case of the sedative hypnotic, tolerance and the withdrawal syndrome always go together (Matthew 254).

11. The abstinence syndrome is evidenced by symptoms such as restlessness, agitation, a fast pulse, and frequently, sweating. This may progress through various stages to toxic psychosis and epileptic fits (Matthew 257). Toxic psychosis is characterized by hallucinations and delusions similar to delirium tremens from alcohol withdrawal (Matthew 257).

* The opinion of Dr. Brown, who is a clinical biochemist, is entitled to particular weight on this point.

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12. Severity of physical dependence is measured primarily in terms of the duration and danger of the withdrawal symptoms exhibited (Weiland 438).

13. The barbiturate-alcohol type dependence is the severest kind of physical or psychological dependence occurring with the mind-altering drugs (Port 100-01, Deutch 473-74). In the case of sedative-hypnotic dependence, there is central nervous system involvement and withdrawal will precipitate serious syndromes such as convulsions, delirium and organic psychoses which can be life threatening (Deutch 473).

While withdrawal may be fatal in the case of the sedative hypnotic drugs, this does not occur in the case of narcotics (Port 79).

14. A clinical study on 116 patients poisoned with methaqualone correlating blood levels of the drug with degree of consciousness, objectively demonstrated the development of tolerance in the case of methaqualone with respect to 42 individuals (Brown 213-24, Matthew 256-57; Government Exhibit 20).

Tolerance to methaqualone on the part of seven patients was established by the administration of a sodium pentobarbital tolerance test. Such patients were also given pentobarbital for the purpose of treatment, the average patient requiring more than 200 milligrams of pentobarbital, indicating a rather marked dependence on this type of drug (Deutch 482). Detoxification of such individuals with gradually reduced doses of pentobarbital took approximately three weeks (482-83).

15. Proof that individuals may become tolerant to methaqualone demonstrates that abuse of this drug may lead to physical dependence. In the case of the sedative hypnotic, such as methaqualone, tolerance is one of the indicia of the withdrawal syndrome (Finding 10, supra).

16. The fact that sedative hypnotic drugs can be cross-substituted indicates they are of equal dependence liability (Port 66-67).

17. In the case of withdrawal from methaqualone, a patient would be expected to go through the minor side effects appearing after eight hours or more. These symptoms would then continue over the next 24 to 28 hours. The patient would then have a significant chance of going on to the major withdrawal symptoms such as convulsions, organic psychosis, and delirium (Deutch 484). A computer study of the symptoms of patients, who by history had taken methaqualone daily, when they could not get the drug, demonstrated that they had an abstinence syndrome indistinguishable from individuals taking tuinal or seconal (Deutch 476).

Opinion testimony such as that of Dr. Matthew, Dr. Port, and Dr. Deutch based on an examination of and interviews with abusers of methaqualone, that abuse of this drug has severe physical dependence liability is persuasive (Port 106, 113-14, 170-71, Deutch 484, 473, Matthew 258).⁶ The record demonstrates their qualifications to make such a judgment based on their evaluation of withdrawal symptoms exhibited in the early stages or on their assessment of histories taken from methaqualone abusers. Such opinions need not be based on an examina-

tion of the entire clinical course of withdrawal. Correct medical procedure and ethical considerations require that treatment be instituted to prevent the dangerous or life-threatening symptoms of the later stages of withdrawal (Port 88, Matthew 258, Deutch 481).

18. The abuse of methaqualone may lead to severe physical dependence (Findings 9 to 17, supra).

19. " . . . In general, a person is considered as psychologically dependent upon drugs when the physical sensation or psychological state brought about through the use of the drug is of such a nature that he desires the repetition of the sensation or state, and feels more or less psychological disturbance or distress during periods of abstinence from the drug." "Comprehensive Drug Abuse Prevention and Control Act of 1970" (H. Rep. No. 91-1444 (Part 1) 91st Cong. 2nd Sess. 1970 at 7; See also Port 106 and Deutch 477-78).

Dr. Deutch, who treated seven abusers of methaqualone, testified that if treatment had not interrupted the withdrawal syndrome, these individuals would have been expected to develop the abstinence syndrome with a significant chance of going on to the major withdrawal symptoms such as convulsions and toxic psychosis, which are life threatening (Deutch 484, 473).

20. Physical and psychological dependence overlap (Port 108). Nevertheless, a person may have severe psychological dependence in the case of a particular drug without being physically dependent on it, and it is possible to be severely psychologically dependent on a drug without exhibition of withdrawal symptoms (Weiland 487).

21. The symptoms of psychological dependence range from mild symptoms such as feelings of uneasiness and restlessness through manifestations such as a compulsion or craving for the drug so that the individual cannot function without it (Port 106-07).

22. Case histories taken by Dr. Lionel Deutch, a New York physician in charge of the inpatient detoxification service at Queens Hospital, demonstrate that persons abusing methaqualone exhibited a craving for the drug lasting from two weeks to a month or more, relapsed after discontinuance, and persisted in use of the drug despite social pressure (Deutch 477).

23. Abuse of methaqualone may lead to severe psychological dependence (Deutch 477, Port 114, 107-08, Findings 20-22, supra).

DISCUSSION

This is a case of first impression. It is evidently the first contested rulemaking proceeding under the Controlled Substances Act pertaining to the scheduling of a drug under Section 202 of the statute (21 U.S.C. Section 812).

The Government and Rorer disagree both on the meaning of the applicable statutory standard, namely:

"Abuse of the drug or other substances may lead to severe psychological or physical dependence"

and the weight which would be accorded to the testimony of the witnesses and certain of the exhibits as well as the inferences which may be drawn therefrom.

It is Rorer's position that the term "may lead to" should be construed as meaning "can be expected to lead in a significant percentage of cases" to severe psychological or physical dependence. DEA argues on the contrary, that the imposition of such a standard cannot be justified either from the legislative history or on the basis of this rec-

ord. In the connection, the Government contends that the term should be equated with meaning "might lead to" or "could lead to" severe psychological or physical dependence. There is no precedent affording guidance on this subject. The Act does not define the term "may lead" nor does the legislative history in the form of the Senate and House reports give specific guidance on this issue. It is evident, however, from the text of the statute that the scheduling of drugs thereunder is intended to be a prophylactic measure before a drug becomes a public health problem in the form of addiction, i.e., severe physical or psychological dependence. This is clear from the plain meaning of the word "may" which requires that the Government demonstrate that the drug has this potential. Moreover, the statute in this respect does not impose a quantitative standard. The dispute between the Government and Rorer as to the adequacy of the proof and the weight to be attributed to certain of the testimony should be evaluated in the light of those considerations.

The proposed findings and supporting arguments principally raise the question of how much weight should be accorded to the expert testimony where there is a conflict between the witnesses or with other items of evidence. An administrative agency, however, is not precluded by conflicts in the evidence from passing on the weight to be accorded to the testimony and other portions of the evidentiary record and making findings thereon. See *Korber Hats Inc. v. FTC*, 311 F.2d 358, 362 (1st Cir. 1962); *Carter Products Inc. v. FTC*, 268 F.2d 461, 491 (9th Cir. 1959) cert. denied 361 U.S. 884 (1959); *NLRB v. Nevada Consolidated Copper Corp.*, 316 U.S. 106, 108 (1942).

The main thrust of Rorer's argument is that the testimony of the DEA witnesses is speculative since none had observed severe withdrawal or psychological symptoms resulting from methaqualone abuse. The testimony of Drs. Port, Matthew and Deutch, on the basis of their observations of abusers of methaqualone and their assessment of the histories of such individuals that abuse of the drug has severe physical dependence liability, however, cannot be dismissed as unfounded speculation. These experts clearly have the qualifications to make such a judgment based on their assessment of withdrawal symptoms exhibited in the early stages and on their evaluation of the histories taken from and interviews with methaqualone abusers. This evidence supports the finding that there is a probability that methaqualone abuse may lead to severe physical dependence. Neither the demeanor or the testimony of these witnesses gave any indication that they would engage in speculation on questions of this nature. Their testimony that the failure to treat patients prior to the onset of major withdrawal symptoms would be dangerous and contrary to sound medical practice is convincing. Under the circumstances, a prognosis by expert opinion of this nature as to the consequences of drug abuse is within the contemplation of the statute whose purpose is to prevent a public health problem before it arises.

There are additional reasons for not rejecting the opinion of DEA's experts for failure to meet a standard of hard medical evidence. Clinical observation by physicians involves not only what the physician sees with his eyes but also requires an exercise of judgment as to the significance of the patient's report of his subjective state.⁷ The opinion

⁶ Pentobarbital is a short-acting barbiturate (Port 67).

⁷ Dr. Matthew of the Regional Poisoning Treatment Center in Royal Infirmary in Edinburgh, United Kingdom, has personally observed about 60 individuals severely addicted to methaqualone (258).

⁷ See Weiland, Tr. 441.

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of the DEA witnesses, based on their observation of patients and evaluation of the history of drug abusers constitutes such an exercise of judgment and should be regarded as reliable. Finally, the view of the DEA witnesses that the abstinence syndrome is best established through determining tolerance is evidently an accepted scientific concept which should not be rejected as speculative.

Turning specifically to the issue of psychological dependence, the testimony of the DEA experts, and in particular, that of Dr. Deutsch, who carefully recorded the histories of methaqualone abusers is persuasive. Certainly, his findings based on detailed histories cannot be considered as conjectural. The opinion evidence of the DEA witnesses compels the finding that there is a probability that abuse of methaqualone will lead to severe psychological dependence. Consideration has been given to the testimony of Dr. Wieland that although there may be cases of methaqualone abuse leading to severe psychological dependence, this is "not dealing in probabilities." (Tr. 457). To the extent that Dr. Wieland's views on this point conflict with those of Dr. Deutsch, the opinion of the latter appears entitled to more weight in the light of his empirical work on this point demonstrated by the record.

Since an individual may have severe psychological dependence without exhibiting symptoms of the withdrawal syndrome, a fortiori observation of the full clinical course of withdrawal cannot be prerequisite to a finding as to the existence of severe psychological dependence.

Although there are conflicts in the evidence between the testimony of DEA's experts and those of Rorer, the Government, by a clear preponderance of the evidence, has established that abuse of methaqualone and its salts may lead to severe psychological and physical dependence. There is no indication in the testimony of DEA's experts that severe psychological or physical dependence would be limited to an insignificant number of instances if abuse of the drug were unchecked.

* Consideration has been given to the contention of Rorer that Government Exhibit 20 demonstrates that methaqualone does not lead to severe psychological or physical dependence. This exhibit and Dr. Matthew's testimony at Tr. 254-57 and 272-76 are cited for the proposition that 43 persons proven tolerant to methaqualone were abruptly withdrawn from the drug and not a single case of severe physical or psychological withdrawal symptoms reported. However, the article is devoted to the treatment of methaqualone poisoning by conservative management such as avoidance of diuretics and does not appear to address itself to the withdrawal problem as such. Individuals tolerant to the drug are not necessarily poisoned (Tr. 260-61). As a result, the silence with respect to withdrawal of an article devoted to treatment of Mandrax poisoning affords an uncertain basis for drawing an inference conflicting with the testimony of Dr. Matthew. His express testimony that he treated persons considered dependent on methaqualone with barbiturates or a strong tranquilizer with a barbiturate and that persons tolerant to the drug, on withdrawal, could be expected to display the abstinence syndrome is persuasive and not vitiated by the possible conflicting inference drawn from the article in question. Moreover, as DEA states, Dr. Matthew did not testify with respect to the article except on the development of tolerance and the treatment of Mandrax poisoning.

* See Dr. Deutsch's citation of Cecil and Loeb, a "classical textbook of medicine", on this point (Tr. 481).

RECOMMENDED CONCLUSIONS OF LAW

A. Under the Controlled Substances Act of 1970 (21 U.S.C. 801 et seq.).

1. The Controlled Substances Act of 1970 was intended to protect the public health and safety by establishing a system of control procedures for drugs with a potential for abuse.

2. These controls include registration requirements, export and import restrictions, labeling and packaging requirements, production quotas, recordkeeping procedures and reports, order forms and prescription restrictions.

3. The controls are effected through a system of scheduling drugs or other substances according to criteria set forth in the Controlled Substances Act of 1970 relating to legitimate medical use and abuse potential.

4. Methaqualone is a drug, with a high potential for abuse and a currently accepted medical use in treatment in the United States within the meaning of 21 U.S.C. 812 (b) (2) (A) and 21 U.S.C. 812 (b) (2) (B), as Rorer has stipulated.

5. The Government has proved by substantial evidence of record that the abuse of the drug methaqualone may lead to severe psychological dependence within the meaning of 21 U.S.C. 812 (b) (2) (C).

6. The Government has proved by substantial evidence of record that the abuse of the drug methaqualone may lead to severe physical dependence within the meaning of 21 U.S.C. 812 (b) (2) (C).

THEODORE P. VON BRAND,
Administrative Law Judge.

Based on the investigations of the Drug Enforcement Administration and after careful consideration of the Recommended Decision printed above, as well as the entire record herein, and upon the scientific and medical evaluation and recommendation of the Secretary of Health, Education and Welfare, received pursuant to Section 201(b) of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 811(b)), the Acting Administrator, Drug Enforcement Administration, finds that methaqualone and its salts:

(1) Have a high potential for abuse;
(2) Have a currently accepted medical use in treatment in the United States; and

(3) May, when abused, lead to severe physical and psychological dependence.

Therefore, under the authority vested in the Attorney General by section 201 (a) (21 U.S.C. 811(a)) and delegated to the Administrator of the Drug Enforcement Administration by § 0.100 of Title 28 of the Code of Federal Regulations (see 38 FR 18380, July 2, 1973), it is hereby ordered that:

1. Section 1301.02 of Title 21 of the Code of Federal Regulations be amended by adding a new paragraph (b) (10) to read as follows:

§ 1301.02 Definitions.

(b) * * *

(10) Each of the substances having a depressant effect on the central nervous system, including its salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific

chemical designation, listed in § 1308.12 (e) of this chapter.

2. Section 1308.12 of Title 21 of the Code of Federal Regulations be amended by adding a new paragraph (e) to read as follows:

§ 1308.12 Schedule II.

(e) Depressants. Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances having a depressant effect on the central nervous system, including its salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation:

(1) Methaqualone 2565

The requirements imposed upon the substances controlled by this order shall become effective as follows:

1. *Registration.* Any person who manufactures, distributes, engages in research, imports or exports any of these substances or who proposes to engage in the manufacture, distribution, importation, or exportation of, or research with any of these substances, shall obtain a registration to conduct that activity on or before November 5, 1973.

2. *Security.* These substances must be manufactured, distributed and stored in accordance with §§ 1301.71, 1301.72(a), 1301.73, 1301.74(a), 1301.75, and 1301.76 of Title 21 of the Code of Federal Regulations on or before January 3, 1974. In the event that this imposes special hardships, the Drug Enforcement Administration will entertain any justified requests for extensions of time.

3. *Labeling and packaging.* All labels on commercial containers of, and all labeling of, any of these substances which are packaged after April 15, 1974, shall comply with the requirements of §§ 1302.03-1302.05 and 1302.06 of Title 21 of the Code of Federal Regulations. In the event this effective date imposes special hardships on any "manufacturer", as defined in section 102(14) of the Controlled Substances Act, 21 U.S.C. 802(14), the Drug Enforcement Administration will entertain any justified requests for an extension of time.

4. *Quotas.* Quotas on these substances will be established to take effect on January 1, 1974. All interested persons required to obtain quotas shall submit applications pursuant to § 1303.22 of Title 21 of the Code of Federal Regulations on or before November 15, 1973.

5. *Inventory.* Every registrant required to keep records who possesses any quantity of any of these substances shall take an inventory, pursuant to §§ 1304.11-1304.19 of Title 21 of the Code of Federal Regulations, of all stocks of those substances on hand on November 5, 1973.

6. *Records.* All registrants required to keep records pursuant to §§ 1304.21-1304.27 of Title 21 of the Code of Federal

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Regulations shall maintain such records on these substances commencing on the date on which the inventory of those substances is taken.

7. *Reports.* All registrants required to file reports with the Drug Enforcement Administration pursuant to §§ 1304.37-1304.41 of Title 21 of the Code of Federal Regulations shall report on the inventory taken under paragraph 5 above and on all subsequent transactions.

8. *Order forms.* Each distribution of any of these substances on or after November 5, 1973, shall utilize an order form pursuant to Part 1305 of Title 21 of the Code of Federal Regulations except as permitted in § 1305.03 of that title.

9. *Importation and exportation.* All importation and exportation of any of the substances on and after November 5, 1973, shall be in compliance with Part 1312 of Title 21 of the Code of Federal Regulations.

10. *Criminal liability.* Pursuant to Title 21 of the Code of Federal Regulations § 1308.48, the Acting Administrator, Drug Enforcement Administration hereby finds that:

1. Individuals are taking methaqualone in amounts sufficient to create a hazard to their own health or the safety of the community;

2. There exists significant diversion of methaqualone from legitimate channels;

3. Persons are taking methaqualone on their own initiative rather than on the advice of a physician.

4. Methaqualone is being used in suicides and attempted suicides as well as causing other injuries resulting from unsupervised use.

Therefore, the Acting Administrator finds that conditions of Public Health and Safety necessitate that any activity with any of the substances, not authorized by, or in violation of, the Controlled Substances Act or the Controlled Substances Import and Export Act, conducted after October 4, 1973, shall be unlawful, except that any person who is not now registered to handle these substances but who is entitled to registration under those Acts may continue to conduct normal business or professional practice with those substances between the date on which this order is published and the date on which he obtains or is denied registration.

11. *Other.* In all other respects, this order is effective on October 4, 1973.

Dated October 2, 1973.

JOHN R. BARTELS, Jr.,
Acting Administrator, Drug En-
forcement Administration,
U.S. Department of Justice.

[FR Doc. 73-21242 Filed 10-3-73; 8:45 am]

INDICTMENT.

In the District Court of the United States

For the Western District of New York

THE UNITED STATES OF AMERICA

-VS-

DUANE E. BALDWIN, WAYNE F. HENRY
and JONATHAN G. KLINKERTMAY 1974 SESSION *Term*

No. 74 104

Vic. T. 21, U.S.C.,
§§841(a)(1) and
846COUNT I**The Grand Jury charges:**

On or about the 30th day of May, 1974 in the Western District of New York, the defendants DUANE E. BALDWIN, WAYNE F. HENRY and JONATHAN G. KLINKERT wilfully, knowingly and unlawfully did combine, conspire and agree together, with each other, and with diverse other persons whose names are to the Grand Jury unknown, to commit offenses against the United States, to wit, to violate Title 21, United States Code, §841(a)(1) by distributing and dispensing quantities of a controlled substance, as enumerated in the Controlled Substances Act; In violation of Title 21, United States Code, Section 846.

OVERT ACTS

At the times hereinafter mentioned, the defendants committed the following overt acts in furtherance of said conspiracy and to effect the objects thereof:

1. On or about May 30, 1974 at or near 121 Avenue E. Rochester, New York, the defendant DUANE E. BALDWIN met with Ronald Martin, an agent with the Drug Enforcement Administration, working in an undercover capacity, and discussed with Agent Martin the sale to Agent Martin of a large quantity of a controlled substance.

2. On or about May 30, 1974 the defendant DUANE E. BALDWIN directed Agent Martin to drive to defendant JONATHAN G.

INDICTMENT.

KLINKERT's residence at 1020 Sunset Trail, Webster, New York.

3. On or about May 30, 1974, at a garage located at or near defendant JONATHAN G. KLINKERT's residence at 1020 Sunset Trail, Webster, New York, Agent Ronald Martin met with the three defendants, DUANE E. BALDWIN, WAYNE F. HENRY and JONATHAN G. KLINKERT.

4. On or about May 30, 1974, at a garage located at or near defendant JONATHAN G. KLINKERT's residence at 1020 Sunset Trail, Webster, New York, defendant WAYNE F. HENRY discussed with Agent Martin the quantity of the controlled substances to be sold and the price for which the controlled substances could be purchased.

5. On or about May 30, 1974, at a garage located at or near defendant JONATHAN G. KLINKERT's residence at 1020 Sunset Trail, Webster, New York, defendant DUANE E. BALDWIN had in his possession and used in the presence of defendants WAYNE F. HENRY and JONATHAN G. KLINKERT a set of scales to weigh the controlled substance which was to be distributed to Agent Martin.

COUNT II

The Grand Jury further charges:

On or about the 30th day of May, 1974 in the Western District of New York, DUANE E. BALDWIN, WAYNE F. HENRY and JONATHAN G. KLINKERT knowingly and intentionally did unlawfully dispense and distribute approximately 7,367 grams gross weight of a substance containing methaqualone, a Schedule II controlled substance as enumerated in the Controlled Substances Act; All in violation of Title 21, United States Code, Section 841(a)(1).

INDICTMENT.

COUNT III

The Grand Jury further charges:

On or about the 30th day of May, 1974, in the Western District of New York DUANE E. BALDWIN, WAYNE F. HENRY and JONATHAN G. KLINKERT knowingly and intentionally did unlawfully possess with intent to distribute and dispense approximately 7,367 grams gross weight of a substance containing methaqualone, a Schedule II controlled substance as enumerated in the Controlled Substances Act; All in violation of Title 21, United States Code, Section 841(a)(1).

JOHN T. ELFVIN
United States Attorney

A TRUE BILL

Foreman

INDICTMENT.

Form DJ-195
(Ed. 2-7-66)

No. _____

74

111

UNITED STATES _____ DISTRICT COURT

Western _____ District of New York

Division /

THE UNITED STATES OF AMERICA

vs.

DUANE E. BALDWIN, WAYNE F.
HENRY and JONATHAN G.
KLINKERT

INDICTMENT

A true bill,

Foreman.Filed in open court this 22nd day
of June, A. D. 1974_____
Clerk.

Bill, § _____

Affidavit of Service

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August 20, 1976

Re: **United States of America vs. Wayne F. Furry**

State of New York)
County of Onondaga ss.:
City of Syracuse)

EVERETT J. REA,

Being duly sworn, deposes and says: That he is associated with Spaulding Law Printing Co. of Syracuse, New York, and is over twenty-one years of age.

That at the request of **Richard J. Arcara, Esq., United States Attorney,**

Attorney(8) for **Government,**

(x)he personally served three (3) copies of the printed ☐ Record ☐ Brief ☒ Appendix
of the above entitled case addressed to:

JOHN M. REGAN, ESQ.

Attorney At Law

711 Wilder Building

Rochester, New York 14614

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Everett J. Rea
.....
EVERETT J. REA

Sworn to before me this **20th** day of **August, 1976.**

Donald C. Quinn
.....
Notary Public
Commissioner of Deeds

cc: **Richard J. Arcara, Esq.**
United States Attorney